DEPARTMENT OF INDUSTRIAL RELATIONS

# FINAL STATEMENT OF REASONS FOR

# PROPOSED ACTION TO AMEND

# CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER 8, SUBCHAPTER 4

# SECTIONS 16421 through 16439.

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# FINAL STATEMENT OF REASONS

## UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9(b), the Director of the Department of Industrial Relations ("Director") incorporates the Initial Statement of Reasons prepared in this matter. Subsequent to the issuance of the initial proposals, the following significant events occurred. Labor Code section 1771.5 was amended to state expressly that for purposes of the chapter governing public works "'labor compliance program' means a labor compliance program that is approved, as specified in state regulations, by the Director of the Department of Industrial Relations." Labor Code section 1771.9 was added to require awarding bodies to operate a Labor Compliance Program in connection with projects funded by another new bond act contingent upon future voter approval of that Act. Pursuant to Executive Order S-2-03 issued on November 17, 2003, the processing of these amendments was suspended for a period of 180 days for purposes of reassessing their regulatory impact on businesses and submitting appropriate reports to the Governor through the Secretary of Labor. The rulemaking process was resumed formally with the issuance of proposed modifications to the text of the proposals on July 15, 2004.

## REVISIONS FOLLOWING INITIAL PUBLIC COMMENT PERIOD

The following sections were revised following the public hearing and circulated for further public comment: 16421, 16423, 16424 (new), 16425, 16426, 16427, 16428, 16431, 16432, 16433, 16434, 16435, 16436, 16437, and 16439.

### Section 16421. Composition and Components of Labor Compliance Programs.

This section sets forth required elements of a Labor Compliance Program and how such a program might be constituted. Subpart (a) enumerates and expands upon Labor Compliance Program requirements specified in Labor Code section 1771.5(b), and subpart (a)(3) sets forth the requirement that contractors keep and submit certified payroll records to the awarding body. The Director had proposed to strike the term "at times designated in the contract" from subpart (a)(3) in order to leave a simplified single requirement that such records be furnished within 10 days of request. However, further comments persuaded the Director not to make this revision, which might have been construed as removing an awarding body's contractual authority to set a schedule for submitting records and requiring instead that the awarding body continuously and repeatedly issue requests in order to obtain these records. Additional language was added to identify the form provided by the DIR for reporting other required employer payments in addition to the form provided for reporting payroll. At the end of this subpart, a statement that these forms are available from the Department of Industrial Relations was substituted for the existing specification that the form could be found after section 16500. The purpose of these changes is to enable awarding bodies and contractors to identify and have ready access to the current version of these forms (provided on the Department's web site). Because the forms are suggested rather than mandatory, this change provides the flexibility to modify the forms to reflect statutory changes without going through the formal rulemaking process.

A new subpart (b) was inserted to clarify that when an awarding body contracts with a third party to operate its Labor Compliance Program, the third party itself must be approved by the Director to operate a Labor Compliance Program. The new subpart further clarifies that it is not intended to limit an awarding body's authority to contract for services in connection with the operation of its own approved Labor Compliance Program, including services provided by specified license professionals. The significant consideration is whether the awarding body is contracting out the power to exercise its governmental authority with respect to prevailing wage enforcement. If the authority is delegated to another entity, that entity must be approved by the Director in accordance with section 16426. However, if the awarding body retains that power but contracts with specified professionals to exercise decision-making authority on the awarding body's behalf, those specified professionals, who are already subject to state licensing and ethical standards, would not have to be separately approved to operate a Labor Compliance Program.

The former proposed subpart (b) was redesignated as subpart (c). A reference in the first line to private entities being approved "under Labor Code §§1771.7 or 1771.8" was deleted as inaccurate and unnecessary. Subsequent to the issuance of the initial proposed revisions, Labor Code section 1771.5 was amended to expressly acknowledge the Director's authority to approved Labor Compliance Programs, and Labor Code section 1771.9 was added to require Labor Compliance Programs in connection with another form of bond funding (*see* Section 16423(4) below). In the same subpart, the word "personnel" was deleted and replaced with "employees and consultants who participate in government making decisions … ." The purpose of this revision was to clarify and specify who is required to file conflict of interest disclosure forms in accordance with Fair Political Practices Commission requirements.

A new subpart (d) was added to clarify that the regulations governing Labor Compliance Programs do not limit the statutory authority and responsibility of awarding bodies under Labor Code section 1726 to recognize and take appropriate action with respect to prevailing wage violations. At the suggestion of a commenter, the language of this subpart has been slightly revised in the final regulation to make it more consistent with Labor Code section 1726, specifically by adding the words "responsibility and" before the word "authority" on the first and last lines and by changing the words "from taking" to "to take" before the word "cognizance." One purpose of this subpart and related revisions to subparts (b) and (c) is to answer the question posed by the Drafter's Comment that followed this section in the initial proposals. The Director now believes an awarding body's authority to contract out for all or part of the operation of its Labor Compliance Program is not limited to the bond-specific projects for which that authority is expressly acknowledged in Labor Code sections 1771.7 through 1771.9. Rather it is a matter of general governmental authority to be determined with reference to the Government Code and other authorities that are outside the specific expertise of the Director. The limitations on contracting authority expressed in these regulations are related and confined to the Director's specific authority to approve Labor Compliance Programs.

**Section 16421, Appendix A – Suggested Checklist of Labor Law Requirements to Review at Prejob Conference.**

This checklist was further revised to correct statutory references in items (4) and (8) and to delete a reference to state affirmative action requirements (formerly item (13)), which were invalidated by Proposition 209. Former item (14), concerning the hiring of undocumented workers, was re-numbered as (13), and the word "federal" was added for clarification purposes in light of court determinations that preclude state regulation in the area of immigration. Additionally, a form for a written certification by a subcontractor was added to the end of the form as a way to establish that subcontractors who do not or cannot attend the prejob conference have nevertheless been informed and are aware of the relevant labor law requirements.

**Section 16422. Applicable Dates for Enforcement of Awarding Body Labor Compliance Programs.**

This section specifies when public works contracts become subject to the jurisdiction of a Labor Compliance Program that is approved by the Director. In subparts (b) and (c) the specified applicable date for a contract with no call for bids was changed to the date of "the award" rather than the date of "execution." The purpose of this revision was to conform to the holding in ***Transdyn/Cresci v. City and County of San Francisco*** (1999) 72 Cal.App.4th 746, which concerned a contract that was awarded but not formally executed. At the suggestion of a commenter, a further revision was made in the final regulation by deleting the word "general" before the word "fund" in subpart (e)(3). The purpose of this further change is to remove an unnecessary limitation on an awarding body's authority to designate the fund into which forfeitures and penalties are deposited.

**Section 16423. Approved Labor Compliance Program Required for Certain Bond-Funded Projects.**

This section sets forth the requirement to have an approved Labor Compliance Program for specified bond-funded projects and specifies that the limited exemption from prevailing wage requirements provided by Labor Code section 1771.5(a) does not apply unless the awarding body uses an approved Labor Compliance Program for all of its public works projects. The term "maintains and operates" as originally proposed in subparts (a) and (c), was changed back to "initiates and enforces" to conform to the statutory language. The purpose of this revision was to avoid any confusion that might be caused by the variance in terminology.

A new subpart (a)(4) was added to include the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century … [subject to voter approval]" to the listed bond-funded projects requiring a Labor Compliance Program, in light of the adoption of Labor Code section 1771.9. In the final regulations, the "subject to voter approval" language in subpart (a)(2) has been deleted in light of the fact that the Kindergarten-University Public Education Facilities Bond Act of 2004 was approved by the voters as Proposition 55 in the March, 2004 election.

Subpart (b) was further revised to require an awarding body to provide notice of whether it intends to operate its Labor Compliance Program for all public works projects. The purpose of this further revision is to clarify whether the awarding body will be entitled to the limited exemption provided by Labor Code §1771.5(a) and will also be able to agree to modified reporting procedures as specified elsewhere in the regulations. Additionally, the requirement to provide any

contract or agreement with a third party to operate the Labor Compliance Program was changed to require only that the awarding body provide "notice" of such a contract. The purpose of this latter revision was to avoid unnecessary paperwork as well as the implication that the Director must approve or directly supervise the contractual relationship between an awarding body and a third party.

**Section 16424. Application for Approval. [New]**

This section was added to specify what information must be included in an application for approval (referring to sections 16425 and 16426, which list the factors to be evaluated), where the application should be sent, and where suggested application forms can be obtained. The purpose of this new section is to make it easier for prospective Labor Compliance Programs to ascertain how to start the application process. This section was added in response to a concern expressed informally by persons interested in seeking approval that there was no clear information available on how to apply.

**Section 16425. Initial Approval of Awarding Body Labor Compliance Program.**

This section [existing section 16426 prior to these amendments] sets forth the factors used to evaluate an application by an awarding body for approval of its Labor Compliance Program. In the final regulations at the end of the first paragraph of subpart (a), language was added to specify that the enumerated factors that follow are to be used for purposes of evaluating whether the entity has the capacity and ability to operate an effective Labor Compliance Program consistent with applicable legal requirements. The purpose of this further revision is to clarify that the factors are all for purposes of evaluation and are not a list of presumptively qualifying or disqualifying factors. When the initial proposals were revised in July, this additional language had been included in section 16426 below, but inadvertently was omitted from this section. The purpose and intent of this language is the same for both sections.

Subpart (a)(1) was further revised to include participation in public works training provided by the Division of Labor Standards Enforcement as a specified relevant form of training for program personnel. Subpart (a)(7) was further revised by changing "willful violations as defined in Labor Code Section 1777.1(d)" to "violations which may lead to debarment under Labor Code Section 1777.1." The purpose of this further revision is to provide a clearer statement of what violation information should be referred without requiring unnecessary and potentially inconsistent or inaccurate interpretation of statutory standards by awarding bodies.

Subpart (c) was revised by deleting both the express requirement for a written request for extension of approval and a stated deadline for that request and approval. The purpose of these further revisions is so that neither awarding bodies nor the Director are hamstrung by inflexible regulatory limits that may not serve any significant purpose. The revisions address a practical problem that has arisen in the past year and a half, with the growth in approved Labor Compliance Programs from less than a dozen to over three hundred following the adoption of the bond-funding statutes at Labor Code sections 1771.7 through 1771.9. The Director has not had the capacity to extend final approval on the twelve month timetable contemplated by the existing regulations, and has extended initial approvals en masse without requiring unnecessary paperwork from pro-

grams experiencing no apparent problems. Some commenters on the further revisions have suggested that the Director eliminate the distinction between initial and final approval, and while the Director is not prepared to make that change at the present time, it will be considered as a possible future amendment.

**Section 16426. Initial Approval of Third Party Labor Compliance Program.**

This section, which is similar but not identical to proposed section 16425 above, sets forth the factors used to evaluate an application by an entity that seeks approval to operate a Labor Compliance Program by contract with an awarding body. In the final regulation the title is being modified so that the language corresponds with the title of section 16425. Subpart (a) was further revised by adding additional language to specify that the enumerated factors are to be used for purposes of evaluating whether the entity has the capacity and ability to operate an effective Labor Compliance Program consistent with applicable legal requirements. The purpose of this further revision is to clarify that the factors are all for purposes of evaluation and are not a list of presumptively qualifying or disqualifying factors.

Subpart (a)(1) was further revised to include participation in public works training provided by the Division of Labor Standards Enforcement as a specified relevant form of training for program personnel. This corresponds with the same revision made in subpart (a)(1) of section 16425 above.

A commenter pointed out that the Director failed to further revise subpart (a)(7) of this section in the same manner as subpart (a)(7) in section 16425 above. This was an oversight that is being corrected in the final regulation. The change and purpose are the same as indicated above.

Subpart (a)(8) was further revised by correcting the reference to section 16421(c) (per the relettering of subparts in section 16421), by inserting "of employees and consultants who participate in making governmental decisions" following the word "compliance," and by adding at the end a reference to participation in training provided by the Fair Political Practices Commission. The purpose of these further revisions is to clarify who is subject to Fair Political Practices Commission reporting requirements and to suggest a means through which the entity may show that the subject employees and personnel have been made aware of the requirements.

Subpart (c) was revised by deleting both the express requirement for a written request for extension of approval and a stated deadline for that request and approval. The purpose of these further revisions is so that neither the entities nor the Director are hamstrung by inflexible regulatory limits that may not serve any significant purpose. The revisions address a practical problem that has arisen in the past year and a half, with the growth in approved Labor Compliance Programs from less than a dozen to over three hundred following the adoption of the bond-funding statutes at Labor Code sections 1771.7 through 1771.9. The Director has not had the capacity to extend final approval on the twelve month timetable contemplated by the existing regulations, and has extended initial approvals en masse without requiring unnecessary paperwork from programs experiencing no apparent problems. Some commenters on the further revisions have suggested that the Director eliminate the distinction between initial and final approval, and while the Direc-

tor is not prepared to make that change at the present time, it will be considered as a possible future amendment.

Subpart (e)(1) was further revised by capitalizing the beginning letter, by replacing the words "and also has provided" with the words "together with" and by adding language at the end specifying that an awarding body must also have supplied notice of whether it intends to operate its Labor Compliance Program for all public works projects (thereby entitling it to the limited exemption of Labor Code section 1771.5(a) as well as the right to use certain modified monitoring and reporting procedures). The additional language matches the change made in section 16423(b) above and refers to the same notice requirement.

**Section 16427. Final Approval.**

This section sets forth procedures and criteria pertaining to final approval. Subpart (a) was further revised by inserting the words "with active enforcement responsibilities" before "for at least eleven continuous months." The purpose of this further revision is to ensure that an approved program has been in actual operation and has a track record by which it may be evaluated before it seeks and is granted final approval.

**Section 16428. Revocation of Approval.**

This section sets forth the grounds and procedures for revoking the Director's approval of a Labor Compliance Program. This section was revised further by deleting the word "Final" from the title and from wherever else it appeared in the regulation. The purpose of this further revision was to make the grounds and procedures applicable to revocation of initial approval as well as revocation of final approval. A new subpart (e) was added to specify that nothing in the section should be construed as requiring the Director either to extend an initial approval granted pursuant to section 16425 or 16425 or to grant final approval except in accordance with section 16427(b). The purpose of this new subpart is to clarify that the revocation procedures and standards do not apply either expressly or by implication to a decision on whether or not to extend an initial approval or grant final approval.

**Section 16431. Annual Report.**

This section sets forth the requirements for filing an annual report with the Director. Subpart (a) has been further revised to change the time for filing an annual report from 60 days after the close of the program's fiscal year to 60 days after the close of the program's annual reporting period. The annual reporting period is defined in turn by a new subpart (c), which provides for the reporting period to correspond with the anniversary of the month in which the program was granted initial approval. These revisions alleviate the practical concerns of the Director having to keep track of fiscal years, of having nearly all the programs file their reports at the same time (since most awarding bodies operate on the same fiscal year), and of the programs themselves having one more report to prepare and submit at a time when they typically would be concerned with other year-end accounting and reports. The last sentence of the new subpart (c) also authorizes the Director to change a program's reporting period for good cause.

In response to a further comment, subpart (a)(1) has been further revised in the final regulation by deleting the words "awarded or" after the word "contracts" so that it now reads "number of contracts monitored or enforced, ..." The language is clearer with the deletion and obtains the information that is relevant to the work of the labor compliance program.

Subpart (a)(3), which requires a summary of penalties and forfeitures imposed and withheld or recovered, was further revised to include a reference to proceedings under Labor Code section 1742. The purpose of this change was to conform the language to current law, reflecting the fact that most recoveries will now come through administrative hearings under section 1742 rather than court proceedings.

The Director had proposed a different new subpart (c) (with the annual reporting period originally as subpart (d)) to provide an annual report alternative based on a new proposed Appendix C form following section 16434. However, for the reasons discussed below, the proposed new Appendix C form is not being adopted, and consequently the proposed reporting alternative based on use of that form also is being withdrawn.

**Section 16432. Audits.**

This section expands upon and explains Labor Code section 1771.5(a)(4)'s requirement that programs "review, and, if appropriate, audit payroll records to verify compliance with [prevailing wage requirements]." The Director proposed revising the title of the section and the language of subpart (a) in order to draw a distinction between the process of *reviewing* payroll records and the process of *auditing* those records. However, the Director is not sure whether the proposed language adequately defined the distinction between the two processes nor whether it clarified what minimum level of activity was required of a labor compliance program. In lieu of making any changes other than the change in terminology originally proposed, the Director is going to study this issue further and address it in a later rulemaking.

Former subpart (a)(1) was redesignated as subpart (b), for the sake of symmetry. The Director also proposed to add an additional sentence after the first sentence to state what might constitute the "best available information" for comparison to payroll records. However, this proposed language is not being adopted at this time, so that it instead can be considered in conjunction with revisions to subpart (a) in a later rulemaking, as discussed above.

**Section 16432, Appendix B.**

Appendix B is an Audit Record Form suggested for use with audits under section 16432. Technical revisions were made to the preamble and to items 6(a) and (b) for the purpose of correcting and updating statutory references.

**Section 16433. Limited Exemption.**

This section restates the limited statutory exemption for awarding bodies that operate a Labor Compliance Program for all public works projects. Subpart (a) was further revised by changing

the statutory reference in the first line from "1771.5" to "1771.5(a)" in order to more accurately reflect the source of the limited exemption. The last sentence of subpart (a) was also further revised by adding the words "or installation" after the word "construction." The purpose of this further revision is to clarify that a project for "installation" is within the $25,000 exemption rather than the $15,000 exemption for alteration, demolition, repair, or maintenance. This further revision also addresses an oversight in adding "maintenance" to subpart (b) but not subpart (a), when initially proposing to amend the existing language to conform to a change in Labor Code section 1720(a)(1)'s definition of "public works."

**Section 16434. Duty of Labor Compliance Program.**

This section currently sets forth the duty of Labor Compliance Programs to enforce prevailing wage requirements in a manner consistent with the practice of the Labor Commissioner. The initial proposals restated this general duty as subpart (a) and added a new subpart (b) setting forth separate specific program duties with respect to apprenticeship standards. The Director proposed to further revise subpart (b)(2) by changing "training fund contributions" to "any contributions required pursuant to Labor Code Section 1777.5(m)." The Director also proposed to further revise the regulation by adding additional new subparts (c), (d), and (e), as well as a new Appendix C. The purpose of these revisions was to address concerns about the lack of specificity provided by subpart (a)'s existing requirement to enforce prevailing wage requirements "in a manner consistent with the practice of the Labor Commissioner." However, the Director is not sure that the proposed language and the proposed new Appendix adequately addressed the task. Consequently, the proposed new subparts, including proposed subpart (b), are not being adopted at this time. Instead, the Director intends to study this issue further and commence a new rulemaking that focuses on what level of activity is required of labor compliance programs under the relevant statutes, particularly Labor Code §1771.5(b).

**Section 16435. Withholding Contract Payments When Payroll Records are Delinquent or Inadequate or When, After Investigation, It is Established that Underpayment Has Occurred.**

This section sets forth definitions and standards governing the withholding of contract payments to contractors based on a violation of prevailing wage requirements, including the requirement to provide certified payroll records. In response to comments received on the initial proposals, the Director further revised subpart (a) by restoring a proposed deletion of language pertaining to the notice given a contractor for a subcontractor's violation. Although the language seemed somewhat incongruous relative to the definition in the first sentence, the information is important and does not appear elsewhere in the regulations.

The Director also proposed adding an additional sentence to limit the amount of withholding for a violation based upon a subcontractor's delinquent or inadequate payroll records. However, the Director is withdrawing this revision and retaining the existing language of the regulation, because the proposed revision did not adequately address or resolve confusion over the distinction between the statutory duty under Labor Code section 1771.5(a)(5) to withhold payments when payroll records are delinquent or inadequate, and the withholding of penalties assessed under Labor Code section 1776(g) when certified payroll records are not produced on a timely basis in

response to a formal demand. The comments on this issue pointed to a serious problem of disproportionality, in light of the apparent authority to stop all payments to the prime contractor on a multi-million dollar project based on the delinquency of a single subcontractor performing a minor piece of the work. While it is imperative that prime contractors take all reasonable and necessary steps to ensure that their subcontractors are in compliance with prevailing wage obligations, the remedy for ensuring compliance by a single subcontractor should not be one that jeopardizes the entire project or has the inevitable effect of penalizing other subcontractors who are in compliance. The Director plans to bring the interested parties together to discuss this issue further and hopes to resolve the confusion over statutory withholding requirements through a further amendment to this section in the near future.

Subparts (e)(1) and (2) were further revised to change regulatory references into statutory references to conform with recent legislation that revised and codified preexisting regulatory definitions of the "Prevailing Rate of Per Diem Wages[.]"

**Section 16436. Forfeitures Requiring Approval by the Labor Commissioner.**

This section enumerates the types of underpayments and penalties to be assessed that must be submitted for approval by the Labor Commissioner. Subpart (b) has been further revised to add a reference to Labor Code section 1742, which outlines the specific procedures through which a Notice of Withholding of Contract Payments may be appealed by an affected contractor or subcontractor. This is a technical change added for clarification purposes only.

**Section 16437. Determination of Amount of Forfeiture by the Labor Commissioner.**

This section sets forth the information to be provided to the Labor Commissioner when requesting approval of a forfeiture that will result in issuance of a Notice of Withholding of Contract Payments based on prevailing wage violations. Subpart (a)(1), which concerns the dates of acceptance and filing of a notice of completion (information provided for purposes of determining when the statute of limitations may run), was rewritten to account for the possibility that neither event has occurred. The further revision makes the subpart more understandable and clarifies that a program should report that the project has not been accepted yet if that is the case. This revision also avoids any implication that a program should wait until a project has been accepted before seeking approval of any forfeiture, an approach which may prevent effective enforcement against subcontractors who complete their work well before the completion of the overall project. Subpart (a)(4) has been revised in the final regulation by removing quotations around the words "audit" and "investigation" and changing the words "as defined in Section 16432" to "under Section 16432." The punctuation and reference to definitions was technically inaccurate and confusing since the terms are not specially defined in Section 16432.

**Section 16439. Request for Review of a Labor Compliance Program Enforcement Action.**

This section sets forth the procedures to be followed by the program upon receipt of a contractor or subcontractor's request to review a Notice of Withholding of Contract Payments. The original proposals substantially redrafted this section to delete obsolete procedures and refer instead to

the regulations governing prevailing wage appeals at Title 8, California Code of Regulations, sections 17200 through 17270. Subpart (a) was further revised by adding additional language referring specifically to the contractor or subcontractor's right to request a settlement meeting under Labor Code section 1742.1(b). The purpose of this further revision is to clarify and emphasize the existence of this separate right, which may be exercised prior to a formal request for review (*i.e.* appeal) of the assessment. In the same subpart, the word "seek" has been replaced with "request" immediately before the word "review" (so that it now reads "request review") to conform to the terminology used in the prevailing wage hearing regulations.

## LOCAL MANDATES DETERMINATION

These regulations impose no mandates on local agencies or school districts. In making this determination, the Director relies both on factors cited in the Initial Statement of Reasons and on the position taken by the Department of Finance in the Test Claim of Clovis Unified School District before the Commission on State Mandates, No. 01-TC-28.

## SUMMARY AND RESPONSE TO COMMENTS:

In accordance with Government Code §11346.45, a set of draft regulations was circulated among persons who would be subject to or directly interested in the subject of the regulations, and written responses were received from attorney representatives of unions, contractors, school districts, and prospective labor compliance program operators. These responses were considered in redrafting the proposals published with the Notice of Proposed Action, but are not the subject of further summary or response here since they predated the formal rulemaking.

During the public comment period, the Director received comments in response to the proposals either in writing, orally at the public hearing, or both, from the following entities or individuals: Yuba City Unified School District [Yuba City]; Donald C. Carroll on behalf of Southern California Labor/Management Operating Engineers Contract Compliance Committee [Carroll]; Construction Employers Association [CEA]; Contractor Compliance and Monitoring, Inc. (a labor compliance program operator and consultant) [CCMI]; Roofing Contractors Association of California [RCAC]; California's Coalition for Adequate Housing [CASH]; Golden State Labor Compliance LLP [Golden State]; Robert E. Jesinger (union side attorney); Chief Deputy Director of Department of Finance, State of California [Department of Finance]; Best, Best & Krieger (law firm representing school districts); Gary E. Scalabrini (attorney representing contractors and districts) [Scalabrini]; San Diego County Office of Education [San Diego COE]; Roland P. Williams and Dan Lesher of Harris & Associates [Harris]; Santa Clara & San Benito Counties Building and Construction Trades Council [SC/SBCBCTC]; S. J. Amoroso Construction [Amoroso]; and Philip Henderson (management side attorney) [Henderson].

Mr. Jesinger submitted additional written comments during the interim period between the close of the initial public comment period and the issuance of further revisions on July 15, 2004.

During the additional public comment period provided after the issuance of the further revisions, written comments were received from the following entities or individuals: Labor Compliance Program Specialists, Inc. [LCPSI]; Northern California Electrical Construction Industry Labor-Management Cooperative Trust [NCECI]; Best, Best & Krieger; Golden State Labor Compliance LLP [Golden State]; California's Coalition for Adequate School Housing [CASH]; Contractor Compliance and Monitoring, Inc. [CCMI]; and the Los Angeles Unified School District [LAUSD].

The comments and responses are group by topic below, starting first with comments about the proposals in general and then going through the proposals section by section. Comments and responses are also divided between the initial proposals and the further revisions.

Comments re Proposals in general during initial comment period:

CASH: Request continuance of hearing and reestablishment of a comment and publication timeline. AB 324, which amends Labor Code §1771.5 to give the Department of Industrial Relations ["DIR"] authority to approve and revoke approval of Labor Compliance Programs ["LCPs"] initiated under AB 1506 doesn't become effective until 1/1/04. Therefore, regulations relating to DIR's authority to approve or disapprove of AB 1506 LCPs cannot go into effect until 2004. At very least regulations should be withdrawn and amended to reflect AB 324.

*Director's Response: These concerns largely were mooted by the passage of time, which included an extended hiatus in the rulemaking process pursuant to Executive Order No. S-2-03. The same commenter reacted positively to the proposals overall after revisions were issued in July of 2004 (*see *below). The Director's authority under Labor Code §1771.5, as clarified by AB 324 [adding subsection (c)], is reflected throughout the regulations; and there is a citation to Labor Code §1771.5 in nearly every reference note.*

CASH: We must comment unfavorably on regulations produced by DIR for implementation of AB 1506. DIR must change fundamentally to become at least in part a service agency and must learn about school districts and assist CASH in teaching districts about details of programs for labor compliance. CASH believes: (1) DIR has wrongly framed proposals, which clearly dictate how school districts must function; (2) in reliance on FPPC letter DIR attempts to establish construct wherein it sanctions, approves and licenses third party contracts to do labor compliance work in California; (3) DIR would best serve school districts by withdrawing proposals after listening to public comments and then establish informal meeting/hearing process with practitioners in field to understand implications for all these new statewide labor compliance regulations; (4) current regulations could be salvaged for use; and (5) school districts and DOR can continue working relationship established through positive efforts of Mr. Chuck Cake to implement law effectively. CASH commits its resources to assisting DIR in this endeavor.

*Director's Response: It is not the intent to dictate how school districts function. As now expressly required by Labor Code § 1771.5(c), the Director approves programs for operation. DIR has not created FPPC requirements; rather those requirements already exist. Among*

*other things, the regulations remind LCPs that they are performing a governmental function and must act within that construct. DIR has continued to consult with CASH and others in drafting revisions, and CASH has reacted favorably following revisions.*

CASH: Proposals fail to recognize constitutional law and state statute and the expansive role of school districts through the structure of law and practice. These regulations also fail to recognize limited role of DIR in connection with school districts under Labor Code §1771.5, which require by way of State Allocation Board regulations that districts seeking release of bond funds seek at least initial approval of their LCPs through DIR. Regulations fail to acknowledge that school districts have authority under existing law to initiate LCPs through their own or contracted employees under Government Code §53060. Districts therefore are not governed solely by the proposed regulations; only third party administrators are. Districts are not required to use DIR-sanctioned LCPs, which has become a creature and extension of DIR. This is an administrative construct which DIR fashioned from the letter dated August 7, 2003 by the FPPC. Districts may choose to contract with DIR-sanctioned LCPs but such third party administrators have no authority until and unless hired by a district.

*Director's Response: These comments which go more to the legality of the proposals appear to reiterate and expand upon the previous remarks. The responses are essentially the same: LCPs and these regulations have existed for some time; certain bond statutes now require districts to have LCPs as a condition for using the bond funds; and Labor Code §1771.5(c) now expressly states what was implicitly understood before that an LCP refers to an entity that has been approved by the Director. Prior to the expansion in the number of LCPs following the adoption of the bond statutes, the DIR had* only *approved LCPs operated by awarding bodies, including some school districts. This is all unrelated to the FPPC letter, the only purpose of which was to clarify who is subject to conflict of interest reporting (of which school districts already should be aware).*

*Regarding authority outside of approved LCPs and a district's contracting out authority, two points are being clarified. Labor Code §1726 gives awarding bodies the distinct authority to take cognizance of prevailing wage violations, outside the context of operating an LCP, and language referring to that distinct authority has been added to section 16421. Additionally, the Director agrees that the DIR cannot limit a school district's contracting out authority subject to one important exception. The exception is that an awarding body cannot take the governmental authority it exercises as an approved labor compliance program and by contract delegate the right to exercise that authority to a third party who is not either an approved program in its own right or a specified licensed professional.*

CASH: Districts may choose to establish LCPs with their own employees or may contract with third parties not sanctioned by DIR to operate the District's LCPs or a combination of the two. DIR's role for such districts is limited to: (A) approving their LCPs as far as finding that they meet criteria of AB 1506; (B) acting as impartial adjudicator of allegations made to Labor Commissioner by districts that contractors have failed to comply with law and confirming or denying districts' findings and penalties or making other conclusions; (C) acting as appellate administrative body for contractors or districts who disagree with Labor Commis-

sioner's response; (D) receiving and reviewing Annual Report of districts' LCPs; and (E) assisting districts by acting as a service and support agency if challenges arise.

*Director's Response: See response immediately above on contracting out. Regarding the second part of this comment, while the DIR's role is not necessarily limited to the enumerated items, it is a fair summary of some of the principal roles of the Director's office.*

CASH: The role assumed by DIR to withdraw an LCP's authority to administer a program may be authorized by law; however, DIR has no authority to direct a district to cease administering its own program with its own employees or with a contractor administering the program. The district would be at risk for the following reasons: district would be at risk of losing state bond funding if it ceases operation on which funding conditioned; district would be open to claims of contractors it stopped paying; district would have liability to workers and others who claim harm based on reliance on contractual commitment to operate program; and projects may be delayed indefinitely causing impacts on crowding, safety and disruption of instructional process. Conclusion that DIR has authority to withdraw authority for district's LCP would be interpreted to mean that Legislature and Governor intend state's interest in promoting labor compliance to take precedence over State constitutional provisions that education of children have first priority in expenditure of state funds. CASH believes therefore DIR's role in event of mistake or failure of program should be one of service. DIR must advise and support but cannot deny operation of the program.

*Director's Response: The Director both agrees and disagrees with this statement. Labor Code §§1771.5 through 1771.9 together require districts to have an approved LCP in order to spend certain bond funding. The consequence of not having an approved program is being ineligible for the funding or having that funding withdrawn. This is a legislative judgment, not the DIR's. In light of this judgment, the state's interest in labor compliance cannot and should not be read as being in conflict with the interest in building school facilities. The Director agrees that the DIR should endeavor to help programs succeed, and believes that the Department has taken that approach within the limited extent of its abilities since the great expansion of programs under the new bond legislation.*

CASH: Role of DIR has changed, as noted, yet not recognized in language of proposals. To extent DIR has publicly sanctioned and approved a third party, as proposed in regulatory language, it has made itself vulnerable to claims and/or lawsuits by districts. It would be advisable that DIR establish basic or minimal criteria for use in determining third party's worth to a district as a potential LCP contractor.

*Director's Response: The first part of this comment is non-specific. The balance of the comments, which appear to suggest that the DIR should be involved in quality-evaluation and control well beyond the process of approval or disapproval of programs, is beyond the scope of these proposals and the usual role of a governmental agency. Initial approval means that a program appears capable of meeting minimum standards, and final approval means that it has that capability as well as a track record of doing so. As with any state certification, it does not constitute the state's guarantee that the person or entity thereafter will always perform competently. Districts are likely to get more immediate and better feedback on the effec-*

*tiveness of their programs through experience and what they hear from workers, contractors, construction managers, and labor compliance interest groups. Organizations like CASH undoubtedly will also develop a body of knowledge in this area that can be shared with others.*

CASH: The State Allocation Board ceased using published forms mandated for use in hiring architects and contractors due to claims and lawsuits against SAB in connection with claims and lawsuits against districts which used the forms.

*Director's Response: The import of this comment is not clear. The Director notes however, that the forms associated with the LCP regulations are all suggested rather than mandatory. At the same time, the regulations let parties know that they will not get in trouble with the DIR if they use the DIR's forms and fill them out properly.*

CASH: DIR has created construct of sanctioned entity approved to or licensed to operate as third party administrator for purposes of operating LCP. In light of conflict of interest concern potentially one arm of DIR, the Labor Commissioner, and thereafter an ALJ in the person of a DIR attorney would be overseeing the conclusions made by the DIR-sanctioned third party administrator. If conflict of interest alleged and proven, both third party administrator and DIR are at risk. If alleged and unproven, DIR at least may appear to be self-serving if they support third party administrator's conclusions against that of a contractor.

*Director's Response: This regulatory structure is contemplated by statute and consistent with having a mixture of administrative, prosecutorial, and adjudicative functions in this and other administrative agencies under state and federal law.*

CASH: Based on a reading that regulations as proposed would govern only DIR-sanctioned third party programs, we support elimination of term "Awarding Body" as proposed. We suggest including the word "sanctioned" before LCP to further distinguish between such programs and districts' LCPs.

*Director's Response: For the reasons notes above, the statutes and regulations require LCPs to be "approved" by the Director whether they are operated in house by an awarding body or by contract with a third party. An awarding body that does the latter still must have approval for operation of an LCP via that arrangement, although the application and approval process would be simplified if the third party itself is already approved. The word "approved" serves the same purpose as the suggested term "sanctioned." However, it does not serve the suggested purpose of distinguishing between types of programs since by law both must be approved.*

Golden State: Generally endorse the opinions of the CASH Select Committee and will not seek to duplicate that input. Hope to call particular attention to issues central to role and effectiveness of third party provider as vital part of the Department's goals.

*Director's Response: See responses to CASH comments above. One of the principal purposes for the amendment of these regulations was to recognize the status and role of third party providers.*

Department of Finance: Believe many school districts and school construction stakeholders are confused and may misunderstand minimum level of activity necessary to reasonably comply with statutes and regulations that govern an LCP. Some districts are unintentionally implementing LCP activities that exceed minimum requirements of the statutes and regulations and consequently may incur unnecessary costs that result in redirection of funds that would otherwise be used to fund construction or modernization of class classrooms. Moreover, ambiguous instructions could result in State-mandated cost claims for costs exceeding allowances approved by the State Allocation Board.

*Director's Response: The requirement for school districts to operate LCPs as a condition for obtaining certain bond funds is a condition imposed by legislation and not by the DIR or these regulations. Since 1990, Labor Code §1771.5(b) has set forth the basic standards of operation imposed on an LCP, and since 1992 the LCP regulations have specified, among other things, that LCP programs should enforce prevailing wage requirements in a manner consistent with the practices of the Labor Commissioner. (8 Cal.Code Reg. §16434.) The requirements are new to school districts only in the sense that few districts operated LCPs before the recent bond legislation. It is not the role of regulations to micromanage programs.*

*In response to this and related comments, the Director attempted to clarify duties and responsibilities in sections 16432 and 16434. However, because the Director is uncertain whether these efforts provided the appropriate clarity consistent with statutory requirements, the Director has determined to make this the subject of a further rulemaking rather than adopting proposed revisions to 16432 and 16434 at this time.*

Scalabrini: Suggest use of term "third party administrator" and clarification that where an awarding body contracts with third parties, the awarding body retains ultimate control. Terminology should be changed so that approved third party that has contracted with an awarding body may "administer" (rather than "operate") an LCP on behalf of the awarding body. Provisions should be added to permit awarding body to terminate contract with third party and contract with another administrator or administer LCP using its own forces. Regulation should make clear that administrator holds same status as any other consultant retained by awarding body and performs duties at will and under direction of awarding body. Third party should not be immune from suit by awarding body for negligent or intentional failure to perform. Do not believe it is appropriate for public entity to delegate full control and responsibility of LCP to third party provider. Concerned about conflicts of interest with entities such as labor advocacy groups that may seek to advance union membership or other goals not necessarily held by awarding body through method of administration. Likewise conflicts may arise with construction management firms that may run program in manner to facilitate contractual commitments or cover shortfalls in firm's performance.

*Director's Response: The suggested change in terminology has been considered but not accepted. The terminology adopted is non-technical and sufficiently clear in delineating between an "in house" LCP operated by an awarding body and third parties who contract to operated LCPs on behalf of an awarding body. The Director wants to be careful about not inadvertently using terminology with special legal meanings that are not intended here. Re-*

*garding the regulation of contractual relationships between awarding bodies and third parties, including the right of control, that really is a matter to be determined by contract between those parties. The DIR's interest is limited to ensuring that whatever structure the parties choose to use is qualified for the task of enforcing prevailing wage requirements. Regarding conflicts, that issue has been addressed in the "rights and responsibilities" language in section 16421(c) and corresponding provisions of section 16426, which emphasize that a third party entity that contracts to operate an LCP must act like a government, pursuant to the constraints on government and the interests represented by government, rather than pursuant to any private interest. Information requested during the approval process regarding interrelationships with private interests is intended to identify potential conflicts although it is not a per se disqualification from operating an LCP.*

Scalabrini: It would be beneficial for regulations to discuss how awarding body's duties concerning withholds for non-compliance operate in context of prompt payment statutes for progress payments and final retention. Likewise, regulations should discuss priority of claimants to withheld funds as between awarding body and stop notice claimants for back charges and liquidated damages, and as between awarding body and DIR for judgment liens and tax liens.

*Director's Response: These are important legal questions but beyond the scope of these regulations and probably beyond the DIR's authority in general, which is limited to prevailing wage enforcement.*

Scalabrini: Regulations should also clarify whether awarding body has option to withhold payment on its own or must obtain approval from the Division of Labor Standards Enforcement ["DLSE"] prior to withholding.

*Director's Response: Providing a full clarification, particularly in light of the preceding comment, was not within the scope of these amendments. In response to a more specific suggestion from another commenter, a new subpart (d) was added to section 16421 to make specific reference to the distinct authority of awarding bodies under Labor Code §1726 to take cognizance of violations and take appropriate action outside the context of operating an approved LCP (but still subject to the due process requirements of Labor Code §§1771.6 and 1742, and related hearing regulations).*

Scalabrini: To extent action is taken by awarding body to enforce the regulations, we believe ultimate enforcement should remain with the Division of Labor Standards Enforcement. For example, rather than the awarding body or administrator assuming rights or responsibilities of the enforcing agency, withholds of payments by the awarding body should be referred to the enforcing agency, similar to requests for determination of an amount of forfeiture under section 16437.

*Director's Response: This is contrary to the intent and purpose of labor compliance program legislation, which is to invest enforcement authority in local programs, subject to the guidance and limited supervision of the Division of Labor Standard Enforcement, rather than retaining that authority in the Division.*

San Diego COE: Clarification is requested as to the purpose of submitting a copy of the third party provider contract with the application. [16423(b)] Is DIR basing approval of the LCP on responsibilities assumed by the provider in the contract? In these times of hardship districts may not be able to delegate all of its LCP responsibilities to a third party provider. The SDCOE regional approach has been extremely successful. Our districts have submitted applications and obtained approval of their own LCPs (using SDCOE approved LCP as a template). Following that approval, many districts contracted regionally for assistance in the implementation of all or part of their LCP. What impact will the proposals have on the success of our regional program, especially regarding final approval?

*Director's Response: The requirement to submit a copy of the actual contract has been deleted, with awarding bodies instead being required only to give notice if they are contracting out all or part of their authority to operate the LCP. The Director also recognizes that a district may contract for all or only part of its program operation consistent with whatever legal requirements generally authorize or limit a local government's contracting out authority. The key concern in terms of LCPs is that the person or entity exercising governmental authority must either be an approved LCP (including an employee thereof) or a specified licensed professional. Stated in opposite terms, a district cannot contract out its governmental authority to a person or entity that is not an approved LCP, unless it is a person who is a specified licensed professional.*

San Diego COE: It is unclear whether all third party providers or simply those that create own LCP must seek DIR approval.

*Director's Response: To express this in light of the preceding comment and response, a third party who does not exercise the district's governmental authority – for example, someone hired to provide bookkeeping or monitoring services but not make decisions about whether to pursue enforcement action – would not have to be an approved LCP. Certain contract licensed professionals, such as a lawyer or accountant, also would not have to be separately approved. Otherwise, if the third party provider in effect will exercise the district's governmental enforcement authority, it will need to be separately approved.*

CEA (oral by representatives): We see regulations proposed that have a lot of conflicts with the law. Secondly we want consistency in enforcement.

*Director's Response: No response on issue of conflicts due to absence of specifics. Consistency in enforcement should be possible through existing requirement in section 16434 that programs enforce prevailing wage requirements in a manner consistent with the practice of the Labor Commissioner (*i.e. *Division of Labor Standards Enforcement).*

CASH Oral concurred in by Golden State and Henderson: School boards very visible and people will come to complain if things go wrong. Most boards are extremely labor sensitive. Department of Education doesn't dictate hiring of teachers.

*Director's Response: These are philosophical remarks. See more expansive comments and responses above.*

Golden State oral: Nothing mandates that district has to have an approved LCP.

*Director's Response: The cited bond statutes mandate having an LCP for projects funded by those bonds and Labor Code §1771.5(c) now expressly defines an LCP as one that has been approved by the Director pursuant to [these] regulations.*

Comments re Proposals in general following revisions in July, 2004:

CASH: CASH thanks DIR for its recent efforts to work with us on proposed regulations relative to school district LCPs. It is clear from revisions to proposed regulations that you considered both our concerns and suggestions. We would like to underscore that it is imperative that DIR function as a service agency for school districts as they initiate and administer LCPs for state-funded projects.

*Director's Response: The Director appreciates this response and the assistance of CASH and others in helping us revise and fine-tune the regulations.*

CASH: Recommend that the term "private entity" be used throughout regulations in lieu of "third party." DIR has no authority to give private entity separate and superior rights in relationship with awarding body. Suggest that DIR have list of approved entities meeting criteria to provide services to districts.

*Director's Response: No change in terminology is warranted because a third party Labor Compliance Program is not inevitably "private." For example, it could be a joint powers agency created for the express purpose of labor compliance enforcement. The Director agrees that the extent of authority given to third party LCP by awarding body is a matter of contract. The purpose of the "rights and responsibilities" language is to clarify that an LCP is performing a governmental function in essentially a governmental capacity; the purpose is not to redefine contractual relationships or create rights independent of that relationship. The DIR already maintains lists of approved entities, including those that serve school districts. These lists are available on the DIR's web site.*

Golden State: Our compliments on the work done since the initial comments and testimony of last year. A great deal of progress has been made toward addressing the practical needs of supporting LCPs. We are concerned about construction contractor interests lobbying for restrictions, ostensibly based on widespread abuse but which would make process cumbersome and legalistic or costly and onerous to the point of creating impetus to eliminate labor compliance. In terms of effective, proactive enforcement of the Labor Code in public construction, there has never been a more successful or cost-effective "force multiplier" than the Department's creation and support of widespread LCPs. Abuses of withholding and document requests are outside our wide experience as third party LCP for almost 80 awarding bodies with 35 to 50 active projects at any time. We have corrected violations quickly through collaborative efforts and informal settlement procedures.

*Director's Response: The Director appreciates this response and the assistance of Golden State as well in helping us revise and fine-tune the regulations. The Director has received constructive comments from all sides of the regulated community, notwithstanding what their suspicions may be about each other. The DIR did not create LCPs; rather they have been impelled by legislation to create themselves. The fundamental purpose of these amendments has simply been to update and clarify regulations that have governed LCPs since 1992. Conversely, it is not the Director's intent to add to or otherwise significantly alter existing responsibilities. The real change that appears to have led to some serious misconceptions about these amendments is the vastly expanded number of LCPs that now are subject to these regulations for the first time.*

CCMI: (1) DIR does not respond timely to e-mails or correspondence, if at all. Division of Labor Statistics & Research ["DLSR"] will not provide last names of persons who respond or confirm information in writing. (2) Conflicting information from day to day from DLSR. Cannot confirm geographic area covered by determination. (3) Cannot get timely information on apprenticeship rates. (4) Someone needs to clarify the process for reporting apprenticeship violations. The Division of Apprenticeship Standards ["DAS"] refers to DIR and DIR refers back to DAS.

*Director's Response: These comments are beyond the scope of the proposals and in particular not subjects covered by the July 2004 revisions to which these comments were sent in response. At the same time the Director notes that these are serious concerns that he intends to follow up on. The Director also notes that staffing levels have been severely impacted by budget constraints over the past couple of years. Regarding item (2) on confirming the area covered by determinations, general determinations cover counties or groups of counties; and an LCP should be able to determine the county where work is being performed and hence the applicable determination without special assistance from the DIR. Determinations are available on the DLSR web site, where contractors and awarding bodies as well as LCPs can have ready access to the information. Regarding timely information on apprenticeship rates, see also the response to comments from the Department of Finance re Section 16421 below.*

CCMI: Need source such as policy manual for correct information about the law.

*Director's Response: This comment is beyond the scope of the proposals, which govern approval and operation of LCPs rather than substantive principles of prevailing wage law. LCPs may refer questions of interpretation to DLSE or to their own counsel, and should also attend training.*

Comments re Section 16421 during initial comment period:

Department of Finance: (1) Clarify "review" with respect to receipts and review of CPRs necessary to verify requirements. Define minimum frequency of review and minimum reasonable level of activities that a LCP must conduct to determine whether CPRs are delinquent, complete and accurate as prescribed by Labor Code §1776(a). (2) Clarify under what circumstances and what minimum level of on-site job monitoring is required, including whether daily record of all workers at job site must be kept, including classifications, and whether sub-

contractors are subject to the same requirements. (3) Define "audit" as it relates to the minimum reasonable comparison of CPRs with other documents maintained by the contractor, sub, or other project personnel. (4) Clarify minimum time period for which a LCP must retain CPRs and other LCP records following completion of a project. (5) Define minimum reasonable level of activities that a LCP must conduct to determine whether a CPR contains the appropriate wages for apprentices. The regulations should address all of the issues covered in the five page attachment (Questions and Answers about a School District's Implementation of a Labor Compliance Program).

*Director's Response: Many of these issues were addressed through proposed revisions to sections 16432 and 16434, respectively governing Reviews and Audits and Enforcement Duties. However, the Director is not sure that the proposals adequately addressed the above concerns and similar concerns raised by other commenters. Consequently, the Director will make this the subject of a separate rulemaking.*

Golden State -- oral: Not terribly troubled at first by rights and responsibilities language – took it in intended context. Vetting process for empowerment of third party LCPs by DIR should be more objective and detailed than here.

*Director's Response: The "rights and responsibilities" pertains to a program's role as an agent of government exercising governmental authority, discussed both above and further below. More specific comments about the evaluation or "vetting" process are discussed in connection with section 16426 below.*

Comments re Section 16421 during interim between initial comment period and July 2004 revisions:

Jesinger: Clarify authority of Awarding Bodies to utilize a Labor Compliance Program as a consultant or contractor under own authority to take cognizance of prevailing wage violations under Labor Code §1726.

*Director's Response: In response to this comment a new subpart (d) was added to §16421 to provide specific recognition of the authority and responsibility of awarding bodies to take cognizance of prevailing wage violations. The Director agrees with the commenter's view on contracting out as previously discussed above. The Director has not tried to address this authority further by regulation, as it is not really a matter of the Director's expertise or regulatory control.*

Comments re Section 16421(a) during initial comment period:

Best, Best & Krieger: Request deferring inclusion of "design-build" until public agencies have a better understanding of requirements and procedures of such contracts.

*Director's Response: This amendment tracks language in Labor Code sections 1720(a)(1) and 1771.7(b), and thus the Director believes it should be incorporated into the regulation to remain consistent with the statutes.*

Comments re Section 16421(a)(2) during initial comment period:

CASH: Referenced prejob conference is a requirement for the LCP and should be so noted. Implication is that contractors and subcontractors must attend. Law requires that conference be held – contractors and subs may attend if available but may not be discriminated against if they don't.

Scalabrini: An acknowledgment signed by contractors and subs of federal and state law requirements discussed at the prejob conference would be more beneficial than the checklist currently provided for. Suggest last sentence be replaced with following:

> "The Awarding Body or Administrator shall obtain written acknowledgment from the contractor and subcontractor of the federal and state law requirements identified and discussed at the pre-job conference. An acknowledgment form in the formal of Appendix A presumptively meets this requirement;"

The form used in Appendix A should also include a certification or designation of the individual authorized to make representations on behalf of the contractor or sub.

CASH – oral: Contractors and subs may be out bidding other jobs. District is obligated to make sure if they don't attend prejob conference to note and make sure materials get to that contractor or sub.

*Director's Response: The checklist is appropriate from the standpoint of informing LCPs what must be covered pursuant to Labor Code §1771.5(b)(2)'s requirement that such a conference be held. The suggestion regarding an acknowledgment has been incorporated into the form (Appendix A) at the bottom, as a way of dealing with the practical problem of subcontractors who do not show up for the conference, including those hired later.*

Comments re Section 16421(a)(3) during initial comment period:

CEA: Strike "at times designated in the contract or". Amend last two sentences to read "Use of the current version of DIR's "Public Works Payroll Reporting Form" (A-1-131) *and Public Works Fringe Benefit Statement" (PW26)* constitutes full compliance with this requirement by the ~~a~~Awarding ~~b~~Body. ~~A copy of this suggested form follows Title 8 CCR Section 16500. These forms are available from the DIR."~~ Changes will bring language into conformity with LC §1776.

CEA – oral: Major concern with time frame for submission of CPRs – ten days is essential to the prime contractor because if implementing LCP of own pursuant to Labor Code §1775(b) they have an obligation to review payroll records on a regular basis [periodic basis]. To have submission less than ten days with mailing and need for corrections ... ten days is the appropriate time and neither contract or LCP should deviate from that.

*Director's Response: The suggested amendments to the last two sentences were adopted. Regarding the suggested deletion of the "at times designated language" and time frames, see the response below to the later comments on this subpart.*

Comments re Section 16421(a)(3) following July 2004 revisions:

Golden State: Disagrees with further revisions. Deletion of "at times designated in contract" suggests that payroll records can only be obtained through 10 day demand letters. Deletion of optional form suggests that DIR's form is mandatory – form is nearly physically impossible to use and many contractors are using computerized programs and services.

CASH: Requests not deleting language "at times designated in contract" and restoring language earlier proposed for deletion regarding awarding body's use of own form. DIR should allow for other options, especially automated payroll, that meets or exceeds data requirements.

LAUSD: (1) LCP should be able to designate by contract when payroll records due and should not depend on 10 day notices; and (2) awarding bodies should be able to use own forms. Also suggests incorporating first change into Appendix A, item 4.

*Director's Response: These comments helped highlight some confusion between the requirements of Labor Code §1771.5(b)(3), which involves the requirement to provide certified payroll records at designated times, and Labor Code §1776, which is a specified procedure for demanding production of certified payroll records with specified penalties for non-compliance. The Director does not believe that it is advisable or appropriate to take away or to appear to take away the awarding body's authority to impose contractual requirements with respect to the submission of documents. Consequently the language originally proposed for deletion is being retained. Regarding the forms, use of DIR forms is not mandatory under the amended language, even though language about awarding bodies creating their own forms is being deleted. The Director wants to encourage uniform use of forms that the DIR knows comply with current needs. In saying this the Director does not intend to preclude or even discourage electronic reporting that conforms to this format. The Director is not incorporating contractual requirements into Appendix A, as the purpose and intent of that checklist is to cover laws rather than contractual requirements. At the same time, nothing prevents an awarding body from covering other issues or concerns at such a conference.*

Comments re Section 16421(a)(4) during initial comment period:

CASH: Recommend changing word "orderly" to "timely" before words "review of payroll records."

Scalabrini: Term "program" should be changed to "procedure."

*Director's Response: These are suggested changes to existing language (current section 16430) that the Director did not propose to amend. The Director does not believe that the existing language requires revision and does not want to create the inference of a change in meaning or requirements that such a revision might imply.*

Comments re Section 16421(a)(5) during initial comment period:

CASH: Suggest eliminating subsection in that prescribed routine for withholding is basic requirement of law but requires action of Labor Commissioner and not simply the LCP.

Scalabrini: Term "program" should be changed to "procedure."

*Director's Response: These are suggested changes to existing language (current section 16430) that the Director did not propose to amend. The Director does not believe that the existing language requires revision and does not want to create the inference of a change in meaning or requirements that such a revision might imply.*

Comments re Section 16421(a)(6) during initial comment period:

CEA: Strike existing language and replace with following:

"(6) All contracts to which prevailing wage requirements apply shall include a provision that the following amounts shall be withheld from contract payments when records are delinquent or inadequate or when, after investigation, it is established that underpayment has occurred:

(a) The difference between amounts paid workers and the correct General Prevailing Rate of per Diem Wages, as defined in title 8 CCR Section 16000, and determined to be the prevailing rate due workers in such craft, classification or trade in which they were employed and the amounts paid;

(b) The difference between the amounts paid on behalf of workers and the correct amounts of Employer Payments, as defined in Title 8 CCR Section 16000 and determined to be part of the prevailing rate costs of contractors due for employment of workers in such craft, classification or trade in which they were employed and the amounts paid;

(c) Estimated amounts of "illegal taking of wages";

(d) Amounts of apprenticeship training contributions paid to neither the program's sponsor nor the California Apprenticeship Council;

(e) Estimated penalties under Labor Code Sections 1775, 1776, and 1813. The amounts withheld for a subcontractor's failure to comply with Labor Code Section 1776 shall not exceed an amount owed to the subcontractor by a contractor for work completed on the project pursuant to the subcontract."

CASH: Subsection is problematic if intent as proposed is to require that DIR-sanctioned third party LCP withhold payment from contractor without approval of Labor Commissioner. Third party administrator has no such authority. Only the district governing board has authority to interrupt payments for good reason or upon a direct demand by the Labor Commissioner.

CEA -- oral: Interpretation on what to withhold fluctuates greatly. If for example a subcontractor fails to provide a certified payroll, some districts say you can only hold the amount of the contract. Other groups interpret that we can hold the whole payment due to the general

contractor, so by minor sub violation worth a few hundred in penalties, a 2-10 million monthly progress payment can be held up.

Labor Code §1771.5 says that the progress payment can be withheld when a violation [or] underpayment is noted, but also when CPRs are not submitted -- concerned that this is in conflict with Labor Code §1776(g), the last sentence of which says the general contractor shall not be subject to penalties for sub's violations.

DLSE's current enforcement of §1776 is against the violator. Assessment will clearly state that only the violator is liable. Law was amended in 1997 through Bruilte bill because general contractor cannot submit CPRs on behalf of sub.

Other than holding retention, there is no other action they can take to gain CPRs. $25 per day penalty can continue on and statute doesn't say when it ends other than perhaps the statute of limitations where you have 180 days after the notice of completion or acceptance.

Golden State – oral: Endorse CEA's concern on withholding. Question of credibility – has to make sense to people learning labor compliance.

*Director's Response: This is existing language (current section 16430) that is based on the statutory language of Labor Code §1771.5(b)(5) and that the Director did not propose to amend. There is a distinction between the requirements of this statute, which helps enable an awarding body or an LCP to monitor prevailing wage compliance, and Labor Code §1776, which is a separate enforcement mechanism backed by penalties. The Director discussed and had attempted to address the issue of over-withholding in connection with section 16435's definition of "withhold." However, the Director is persuaded that the proposed amendment did not adequately consider all potential ramifications, and that further study was required before attempting to further define or construe these statutory requirements by regulation. The Director agrees with the comment that withholding should be proportional to the problem it seeks to correct. The Director hopes to bring interested parties together soon to devise a workable amendment.*

Comments re Section 16421(b) [new] following July 2004 revisions:

Golden State: Little logic in enumerating professions.

CASH: Suggested amendment deleting enumeration of professions without comment.

*Director's Response: This subsection addresses the question (raised by Golden State previously) of when an awarding body must contract with an approved LCP. Because enumerated professions are separately licensed and regulated by state, they should not require additional DIR approval in order to provide LCP-related professional services by contract with an awarding body.*

Comments re Section 16421(c) during initial comment period [originally proposed as subpart (b)]:

Carroll: 1. Believes conflict of interest provisions are appropriate. 2. Believes each contract for providing LCP services by third party should require approval by Director; do not believe it is possible to approve a program without knowing who is responsible.

CASH: Subsection identifies the private entity which is, under the construct of these regulations, a third party sanctioned by DIR to operate an LCP.

Golden State: "Rights and responsibilities" language taken to its literal extreme may be overbroad in that awarding body may retain rights and responsibilities unto itself even with comprehensive third party LCP. Urge judicious response to comment, preserving vital empowerment that comprehensive third party support of awarding bodies requires. Vast majority of districts are small to moderate sized agencies that lack staff, training, or experience to implement own programs. Third party providers must have authority and responsibility to act in all but most punitive aspects of program with authority and independence, subject only to constraints of state law and governance of DIR. To fall short of this level of empowerment is to force smaller awarding agencies to accept level of involvement in day-to-day detail that they lack resources to fulfill.

Scalabrini: Proposed redraft to reflect that AB retains ultimate control over the LCP. Suggest that first sentence be revised to read as follows:

> *"(b) A private entity that is approved by the Director ~~under Labor Code §1771.7 or 1771.8~~ to ~~operate~~ administer a Labor Compliance Program ~~and that operates a Labor Compliance Program~~ pursuant to a contract with an Awarding Body or a Joint Powers Authority shall have the same rights and responsibilities as the Awarding Body or Joint Powers Authority in administering the Labor Compliance Program, provided that the Awarding Body or joint Powers Authority maintains control of the Labor Compliance Program and oversees the work performed by the private entity."* [It is not clear whether the commenter would delete all that follows.]

Regulation also should specifically provide that all documents maintained by the Administrator be returned to the AB upon request or termination of the contract.

CCMI: Object to any requirement which involves any greater regulatory review or paperwork on the part of a third party administrator. To the extent this becomes a requirement all requirements of Political Reform Act and other applicable requirements must be clearly communicated to third party administrators.

*Director's Response: The suggested deletion of statutory references has been followed as the references appear unnecessary and already obsolete in light of another new bond statute. The other proposals were not accepted. The Director does not believe it is appropriate or feasible for the DIR to regulate contractual relationships between awarding bodies and third party LCPs except to the limited extent of requiring that a contract that delegates governmental authority be with an approved LCP or other specified licensed professional. The extent to which an awarding body contracts out or retain its authority is a matter to be negotiated between the parties and not otherwise regulated by the DIR. In other provisions the Director has emphasized the duty of third party LCPs to become informed about and to comply with*

*FPPC requirements. Local agencies should, as a matter of course, be aware of these requirements and of the kinds of employees and consultants to whom these requirements apply.*

Comments re Section 16421(c) following July 2004 revisions:

Golden State: Reiterates prior comment about LCPs needing to be granted rights and authority to do job.

CASH: Delete "rights." See comment re proposals in general following July 2004 revisions above.

*Director's Response: As noted in the general comments section above, the phrase "rights and responsibilities" pertains to the third party LCP's role in exercising governmental authority. It is not intended to modify or delimit whatever rights and responsibilities are extended or withheld by contract.*

Comments re Section 16421(d) [new] following July 2004 revisions:

Golden State: Suggests that language should read as follows:

> "Nothing in this section or these regulations shall be construed as limiting the responsibility and authority of an Awarding Body ~~from taking~~ to take cognizance of prevailing wage violations ..."

CASH: Proposes same amendment as Golden State without further comment.

*Director's Response: The proposed change was accepted as more consistent with the language of Labor Code §1726.*

Comments re Section 16421 Drafter's Comment on contracting out for general purpose LCP:

Summary of comments: Several commenters believed that this authority exists while one argued that it does not based on the distinction in language between Labor Code §1771.5(a), which does not mention contracting out for operation of an LCP, and Labor Code §§1771.7 – 1771.9 [the new bond statutes], which do refer to that option. Commenters also offered policy arguments on why the authority should be recognized, and one commenter noted that the limited exemptions provided to all-purpose LCPs under Labor Code §1771.5 [also section 16433 of the regulations] are so low as to be irrelevant in light of current construction costs.

*Director's Response: For reasons previously noted, the Director agrees that the authority exists and that it is not a proper subject of regulation by the DIR except with respect to the limited issue of requiring that governmental authority can only be contracted out to an approved third party LCP.*

Comments re Section 16421 Drafter's Comment on use of Joint Powers Agreements:

Summary of comments: Two commenters favored this approach for practical reasons. One commenter stated that this is a legal question under the Government Code and not suitable to resolution by DIR regulation.

*Director's Response: In subpart (b) of this section and elsewhere, the Director has acknowledged the use of JPAs as a vehicle for operating an LCP "to the extent otherwise authorized by law." The Director also agrees with the other comment that any potential legal question about this authority must be resolved under the Government Code and not by DIR regulation.*

Comments re Section 16421, Appendix A during initial comment period:

CEA: In item (4) replace 1776(f) with 1776(g).

RCAC: Item (11) item requires the contractor to be properly insured for workers' compensation under Labor Code §1861, but that section does not state or require that the contractor be properly insured by appropriate class codes for the type of work performed. One of the biggest abuses in the workers' compensation system is intentional misclassification to obtain a competitive advantage, especially in the roofing industry where rates are so high as to provide more incentive to cheat. Believe "properly insured" would mean not only that company has workers' compensation but that class codes correspond to work they will be performing.

Best, Best & Krieger: Delete item (13) as affirmative action in public contracting no longer permitted.

*Director's Response: The suggested modification to item (4) and deletion of former item (13) were made as suggested. The comment about (11) identifies a potential problem but does not point out a need to amend the language of the Appendix.*

Comments re Section 16421, Appendix A following July 2004 revisions:

Golden State: Should indicate that certification language is suggested rather than mandatory.

CCMI: Suggests deleting item (10) on grounds that Business & Professions Code §17200 has been declared unenforceable by federal court, deals with advertising, is difficult to explain to contractors, and has no connection to prevailing wages.

Interpret certification at end of form as replacement for earlier acknowledgment and as not requiring copies of Code or regulations to be provided. No directive provided as to what happens if subcontractors do not attend, but LCPs should not be penalized. Certification should include obligation of contractor to inform all subs.

*Director's Response: To the Director's knowledge, B&P Code §17200, which essentially treats any statutory violation, including violations of wage standards, as an unfair business practice, remains viable and available as an enforcement mechanism to private individuals. With a four year statute of limitations, it also prescribes the longest limitation period for wage violations.*

*Regarding the Certification, the entire form (which includes the Certification) is designated a "suggested" checklist, so no further clarification of its optional nature is necessary. Regarding the purpose of the Certification, other commenters pointed out that there is a statutory duty to conduct a prejob conference but no express corresponding duty for contractors and subcontractors to attend nor any consequence for failing to do so. The intent of the certification is to place the onus on subcontractors to be informed of requirements (and to acknowledge same). Use of the form may also help prime contractors establish one of the defenses needed to avoid joint liability for penalties assessed for a subcontractor's violations under Labor Code §1775(a).*

Comments re Section 16422 during initial comment period:

Scalabrini: Operative date when there is no Call for Bids or a Design-Build RfP should be the date of the *award* of the contract rather than the date of *execution* per the court's holding in ***Transdyn/Cresci v. City and County of San Francisco*** (1999) 72 Cal.App.4th 746.

*Director's Response: The commenter is correct, and the language of subparts (b) and (c) was revised accordingly.*

Comments re Section 16422 following July 2004 revisions:

CCMI: Date of award needs to be defined. Suggest defining as "when the contract is approved by the governing board, when the contract is signed, or when work begins on the project."

*Director's Response: These subparts will have only limited application in practice, and the correct date can be ascertained through reference to the court ruling. The commenter's definition is not correct.*

CASH and LAUSD: Suggest deleting the word "general" as a modifier of "fund" in subpart (e)(3).

*Director's Response: This revision was made. The DIR has no regulatory interest in controlling the type of fund into which penalties and forfeitures are deposited, provided that it is a public fund under the control of the awarding body rather than a private account.*

Comments re Section 16423 during initial comment period:

CASH: Proposal uses term "maintain and operate" rather than statutory "initiate and enforce." "Establish" also used in place of statutory "initiate." No comment is provided to explain why these alternatives to the perfectly clear statutory language are necessary or appropriate. We recommend keeping statutory terms to insure uniformity and avoid possible confusion over what awarding bodies' duties are in this regard.

CCMI: Objects to requirement to provide contract with third party administrator because DIR has already approved third party administrators. Should only require that there be a contract

with approved third party administrator. Current system provides that agency either provides certification of own LCP or provides State Allocation Board with name of third party administrator.

Best, Best & Krieger: Purpose for requiring submission of contract is unclear. Does DIR anticipate involvement in contractual relationship? Requirement does not address contracting out with third party provider subsequent to submission of application.

Golden State: Endorse position that copies of LCP contracts not be tendered to DIR. Such tender suggests review and approval of such documents by DIR. This perhaps is an unintended consequence but will create duties and liabilities on the part of DIR that inevitably will prove unmanageable without foreseeable benefit to the public, awarding bodies, or workers.

*Director's Response: While the statutory term "initiate and enforce" does not seem entirely natural or clear, the Director agrees with the commenter that it is better to keep the terminology consistent, and consequently withdrew that particular change. The Director also agreed with concerns related to supplying contract documents for review, and changed the language to simply require giving "notice" of such a contract.*

Comments re Section 16423(a)(2) following July 2004 revisions:

Golden State and CASH: Delete contingent reference to voter approval of Kindergarten, etc. Act of 2004 in light of passage in March 2004 election.

*Director's Response: This deletion was made.*

Comments re Section 16423(b) following July 2004 revisions:

CCMI: Clarify that there is no requirement to submit a separate application for all-purpose LCP.

*Director's Response: Whether LCP intends to enforce for all projects and thereby take advantage of exemptions under Labor Code §1771.5(a) and 8 CCR §16433 is part of the information to be supplied with an application; it does not require a separate application per se. However, an awarding body intending to change the character of its LCP would need to notify and be certified by the Director for that change; and the standard for approval may be different if, for example the change substantially increases the area and scope of responsibility for the LCP.*

Comments re Sections 16424 through 16427 following July 2004 revisions:

Golden State and CASH: Suggest dispensing with concept of initial and final approval for limited purpose (*i.e. bond* project) LCPs.

*Director's Response: This suggestion is beyond the scope of these proposed amendments but will be considered for future action.*

Comments re Sections 16425(a)(2) following July 2004 revisions:

Golden State: Average number of public works contracts administered annually is meaningless except for all purpose LCPs. Suggests revision to indicate average number that will be subject to LCP enforcement.

CASH: Same proposal without further comment.

*Director's Response: This is a preexisting requirement that the Director did not propose to amend. The suggested revision will be considered for future amendment.*

Comments re Sections 16425(a)(3) following July 2004 revisions:

Golden State: Reiterates prior comment (with respect to section 16426(a)(3)) that DIR should not do qualitative analysis of resources vs. objectives.

CASH: Modified version of same proposal without further comment.

*Director's Response: This is existing regulatory language to which no change was proposed. Some qualitative analysis is a feature of virtually any contract or certification. If a single individual with no staff or facilities proposed to run a school for 200 students in grades K-8, handling all teaching and administrative duties by himself, a school district would have no difficulty concluding that he lacked the capacity and resources to do so.*

Comments re Section 16425(a)(5) during initial comment period:

Scalabrini: Term "competent" is ambiguous and should be deleted. Suggest following:

*"The availability of ~~competent~~ legal ~~support~~ counsel for the Labor Compliance Program, with relevant legal experience (i.e. public works, labor and/or construction law)."*

*Director's Response: The language proposed initially was retained. "Competent" is a highly (if not well) defined term in reference to the legal profession. Related experience by itself is not indicative of ability to handle the legal responsibilities associated with labor compliance enforcement.*

Comments re Sections 16425(a)(5) following July 2004 revisions:

CASH: Suggested deleting "competent" without further comment.

*Director's Response: See response immediately above.*

Comments re Section 16425(a)(7) following July 2004 revisions:

CASH: Suggests adding modifier "for projects subject to LCP jurisdiction" without further comment.

*Director's Response: The proposed modifier would be superfluous since this subpart describes a procedure rather than imposing a requirement. Also, awarding bodies have an independent duty to take cognizance of violations under Labor Code §1726.*

Comments re Section 16425(c) following July 2004 revisions:

Golden State: Reiterates suggestion to dispense with concept of initial approval and notes that data required for final approval would have to go into Annual Report form.

CASH: Language suggested that embodies comment on 16424 – 16427 above. Also would add requirement for DIR to maintain list of inactive programs. (No explanation provided.)

*Director's Response: These suggestions are outside the scope of these proposals and revisions, but will be considered for future action.*

Comments re Section 16425(d) following July 2004 revisions:

Golden State: Notes that awarding bodies are maintaining back-up LCPs of their own although operating through third party LCPs. Districts want back up if third-party relationship ends, but DLSE concerned about whom to communicate with. Suggests maintenance of an "inactive" list and reporting format and language for dual program to indicate use of third party LCP and inactivity of own LCP.

*Director's Response: This comment points out an inherent source of confusion. Each awarding body that operates an LCP, whether on its own or through a third party, must have its own program approved and file its own report, irrespective of whether or not it contracts out or operates dual programs. Inactivity would appear to be a reason not to dispense with initial/final approvals. "Active enforcement responsibilities" language in the section on Final Approval (16427) accounts for need to have an active program. This subject may warrant study for future action.*

Comments re Section 16426 in general during initial comment period:

Golden State: Given dependency of vast majority of agencies on third party support, this regulation is perhaps most vital to effective and credible implementation of Department's goals. From personal perspective (of President of Golden State) most important element of bringing compliance to industry that has to large extent been passive in regard to its implementation, is credibility. Any hint of second agenda undermines goal of engendering trust and voluntary compliance by the contractor. Provision of third party services by parties with inherent interest in contracts, such as construction managers, project managers, project architects, and project inspectors is a clear example of such conflicts. We strongly encourage DIR to focus and strengthen criteria under which third party LCPs are governed by DIR. Suggest that list of obvious parties in conflict be expanded to reflect types of firms listed above to reflect reality of the public works environment. [16426(a)(3)].

Best, Best & Krieger: Unclear whether "operate" refers to third party provider that creates own LCP or includes third party provider that implements and enforces a LCP created by a district. Since proposals are silent as to latter, we trust that third party providers may continue to operate such programs. Proposals don't define or provide criteria for determining "good cause" to deny or withdraw approval.

Scalabrini: Suggest that title be changed to "Approval of a Third Party Administrator of a Labor Compliance Program."

Harris: This section intends to provide guidelines for third party administrators, criteria that are deemed appropriate by DIR. This is to let awarding bodies determine if a conflict of interest might exist between the third party administrator and other contract entities. Problem with this approach is that the criteria will be subjectively and arbitrarily evaluated based on undefined value determination. Awarding bodies will then apply without benefit of rationale used to establish the criteria.

If DIR desires to provide commentary on acceptable relationship criteria it must be complete and comprehensive with terms fully defined and free of misinterpretation. Have prepared this list for consideration.

1. Conflict exists when contractor is also a third party administrator. Will be true whether or not contactor [is] performing work for the agency. Entities third party will hold LCP sway over are direct competitors.

2. Conflict will also exist when a union organization is a third party administrator. Charge of union is to represent its membership. Direct conflict will exist when a non-union contractor is having its compliance enforced by an entity to which it is in direct disagreement.

3. A Construction Manager At Risk, Construction Manager/General Contractor, Multiple Prime, and Design/Build are all project delivery methods used by awarding agencies. Conflict will exist in each when they are also providing third party administrator services. There is a direct monetary and performance incentive that will compromise the ability of the third party administrator.

4. There is **NO** conflict when a Third Party Construction Manager also is the third party administrator. The TPCM is an extension of the Awarding body and has a fiduciary and contractual responsibility to solely represent the interest of the Awarding body. There is no monetary or project performance incentive to the TPCM. The TPCM typically has provided labor compliance monitoring on behalf of public agencies for over 25 years and provides professional services to the awarding agency. If attorneys, accountants, designers, and architects have been able to provide professional services, the TPCM should be afforded the same consideration.

DIR should not venture into the realm of defining acceptable third party administrator relationships. Awarding bodies have been addressing conflict of issue concerns in their contract documents for the past 30 years. Disclosure is a matter for the agency to address. Nothing in the existing or revised regulations will restrict their contacting approach. DIR should remain mute on what are appropriate relationships for third party administrator organizations.

Golden State – oral: Awarding body will judge qualifications when hiring third party LCP. Because awarding body won't always be interested in strong enforcement Demosthenes shield must hang over head of third party provider – subject to continuing good graces of DIR.

Henderson – oral: Up to DIR to figure out what want to do with third party providers. Up to districts to decide what want to do contractually.

*Director's Response: These comments address four general topic areas, most of which are also addressed in connection with other sections: (1) the relationship between third party programs and awarding bodies; (2) criteria governing the approval of third party programs; (3) a suggested change in terminology; and (4) conflicts of interest. Because Labor Code §§1771.7 and 1771.8 provided the first express statutory recognition for contracting out for the operation of an LCP and because those statutes created a huge rise in the demand for LCPs, non-governmental third party programs began to apply and the Director started approving such programs to operate LCPs. These amendments have been drafted in recognition that there should be an approval process for such entities that is similar to one for awarding bodies but slightly different in terms of factors that must be looked at. These amendments have also been drafted in recognition that it is up to the awarding body to decide what kind of LCP it intends to operate, whether it will be in house or entirely by contract with a third party or something in between.*

*Additional language has been added to the preamble of subpart (a) (as well as to the preamble of subpart (a) in section 16425) to indicate that the listed factors are all part of the evaluation process. There are no per se disqualifying factors. Each program should be evaluated on its own overall merit; and if there is a problem area that is capable of being addressed, a program should have an opportunity to do that in lieu of simply having its application rejected. Regarding the suggested terminology change, that has not been accepted for reasons discussed above, specifically because the terminology originally chosen appears appropriate and other terminology potentially may have "term of art" meanings that the Director would not want to incorporate.*

*Harris has provided a useful discussion of conflicts of interest, which are also addressed in connection with subpart (a)(3) below. The purpose of the evaluative and reporting factors related to conflicts of interest is to identify and require disclosure of potential conflicts. It is not the Director's intent to state that a program will be disapproved if it or its personnel have had a past relationship with a party in the public works world; as several commenters pointed out, a past connection to some part of the public works equation is almost essential in terms of having the experience and ability needed to take on labor compliance enforcement. It is not a problem to have performed a different role in the past. The problem is in serving two different masters at the same time, such as hiring the attorney who presently represents major construction contractors or major construction trades unions to serve simultaneously as the LCP's attorney. There would also be a problem as noted elsewhere, if a third party program used its contractual governmental authority to serve private interests, such as by disclosing confidential information to aid in an organizing drive or withholding public information to frustrate the efforts of a labor compliance watchdog organization.*

*Harris and others have raised the issue of how to characterize construction managers, meaning the persons hired by awarding bodies to oversee public works construction projects, in the scheme of potential conflicts. The Director notes that a construction manager works for the same master, the awarding body, as a labor compliance enforcement officer. As such, there is no inherent conflict of interest between the roles even though they may have different sets of priorities. Consequently, construction managers were not added to the list in subpart (a)(3). Regarding providing some further criteria for evaluating conflicts, as Harris also suggests, the Director believes that this a matter within the expertise of awarding bodies, who as units of government must deal with such issues, including FPPC reporting requirements, on a regular basis. The Director's larger concern in drafting this particular section is that private parties that seek approval to operate labor compliance programs, be fully aware of this aspect of governmental service.*

Comments re Section 16426 in general following July 2004 revisions:

CASH: DIR does not have authority to approve "operation of" private entity LCP, and does not have authority to approve a private entity's LCP that, subject to contract enforces school district's LCP.

*Director's Response: The thrust of this comment is unclear, and it may be more nuanced than the regulatory intent. DIR sets minimum standards for LCPs regardless of how composed or operated. DIR does not intend to monitor contractual relationships beyond requiring compliance of any LCP with the requisite standards and procedures.*

Comments re Section 16426(a) during initial comment period:

Golden State: For any factor in section, suggest that DIR provide greater clarity as to impact on approval or denial. Establishment of program is substantial undertaking and applicants deserve fair warning and reasonable degree of clarity concerning potential disqualifying factors. Just saying the Director will consider a general subject is not reasonable definition or notice to prospective applicant of what could or even should be a fatal conflict or consideration. Some yardstick or minimum standard in plain English would contribute much to all of the considerations listed.

Element of applicant intent should be eliminated as arbitrary and subjective. Intent absent further guidance defining limits and implications has little utility – can be anything from narrow objective view of present opportunities to "pie in the sky wishful thinking" ten years out. Best of firms would say their intent is to serve everyone despite the fact that they are currently organized for a much smaller scope of operations and intend to grow carefully and intelligently into that ambition. Nothing wrong with their intent just because it bears no resemblance to their initial organization and resources. Now matter how addressed, will never be other than meaningless statement. Prior to approval potential applicant would foreseeably be unable to name more than one or two agencies with whom they intend to contract. Provision acknowledges that there might not be any specific agencies that can be named. If so, what is the significance of the answer? What is the significance of listing every public agency in the state?

While organization and resources do have a material bearing on an LCP's ability to serve a certain geographic reach or number of clients, it would seem unmanageable for the DIR to attempt to make determinations in this area. We suggest you allow the market and the AB's common sense to prevail here. In the end, if a firm is not up to handling the workload that they take on, you will probably get a chance to deal with it on the basis of performance deficits – that would be unfortunate but probably the only way that DIR can effectively wade in on the issue.

DIR vetting procedures currently in place and client-type listings appearing on web site presumably already address the question of appropriate client type. Short of developing an official testing or pre-qual procedure by type, not sure how much further DIR could or would go.

*Director's Response: The Director incorporated additional language into the preamble subpart to indicated that the listed factors are for purposes of evaluation. None is inherently disqualifying. DIR has already approved over 300 programs and has a track record on approvals and disapprovals. The DIR's intent is to qualify, and there is no list of absolute disqualifying factors – creating such a list would be a daunting task.*

*The Director expects that a program would express its intent about the scope of its operations in terms of the immediate present tense. People make realistic statements of intent all the time, such as when advising an insurer of projected activities and risk factors when obtaining an insurance policy.*

Comments re Section 16426(a) following July 2004 revisions:

Golden State: Suggests adding modifier "private" before entity and eliminating language about "capacity."

*Director's Response: The suggestions were not accepted. A third party LCP is not inevitably "private;" for example, it could be a joint powers agency created for the express purpose of labor compliance enforcement. Regarding "capacity" see prior response to comments on section 16425(a)(3) above.*

Comments re Section 16426(a)(2) during initial comment period:

CCMI: Objects to limitation to geographical area. Either entity is qualified or not. DIR is right to evaluate work but should not restrict due to geographic distance.

Golden State: Should be deleted. Intended geographic scope and intended specific awarding bodies to be served are simply speculation at one point in time. We understand where the general intent might be but see it as unworkable and in the end problematic. One must question the rationale/purpose of this information and significance of the response. Initially there may be a practical significance in light of a company's organization and resources – but it would only be true that day; tomorrow the factors may change. Drafter's Comments at end of section suggest DIR may seek to evaluate later developments in light of initial statement of intent. This would create a circular process of second-guessing. Drafter's Comments also suggest that geography and intended clientele has some bearing on several disparate issues at

same time, specifically resources, appropriate client type, and conflict of interest issues. Attempting to address all three in light of a single initial statement both now and in future is not going to be successful. We suggest all three areas be looked at separately, with geography or client type being addressed only where those factors are pertinent.

*Director's Response: The criterion was retained. As noted elsewhere, geography is not a per se disqualifying factor. On other hand, it is a relevant if a program intends to monitor projects from a remote distance. One significant consideration is how easy it will be for workers to communicate with the program and vice versa as well as whether there is any capability to do on site monitoring.*

Comments re Section 16426(a)(2) following July 2004 revisions:

CCMI: Still concerned about geographical scope provision; CCMI is on the road around the state.

*Director's Response: The commenter's own experience shows that geography is a factor for evaluation but not a per se limit. While many aspects of monitoring can be performed remotely one concern not addressed by commenter is ease of access of workers to enforcement personnel when not on site.*

Comments re Section 16426(a)(3) during initial comment period:

CCMI: Term "other close affiliation" is extremely broad. Every third party LCP would have one or wouldn't be qualified. Agree with other provisions.

Golden State: Add construction managers, project managers, project architects, and project inspectors to list of firms in clear conflict with the provision of impartial LCP services. This is essentially a conflict of interest provision and needs to stand alone irrespective of geographic reach, resources, or client type. This is one of the most important credibility issues the proposed amendments can address. General objective is to preclude entities with interest or control in public works contracts from providing third party LCP services. Underlying pressures could lead to: (1) punitive labor compliance enforcement actions used as leverage in furtherance of contractual issues unrelated to enforcement of labor laws; (2) enforcement ignored or weakened to avoid issues that could complicate contractual relationships; or (3) enforcement used in discriminatory way to further market competition issues between organized labor and merit shop interests. Any time conflict or potential created, credibility and effectiveness of compliance administration and enforcement suffer with long term deleterious effect on contractors' attitudes.

What entities are subject to compliance?

(1) Awarding bodies have vested interest in public works contracts and are empowered to create own LCP. While abuse by awarding body not outside the realm of possibility, concern over conflict of interest absent widespread and dramatic evidence of abuse is not worth consideration at this time.

(2) Architects and other design professionals have direct and inescapable vested interest in p.w. contracts they are assigned to. They are directly at risk of criticism over change orders and have adversarial role in negotiations over such issues. Also granted broad powers of adjudication over acceptability and scope of work; some are also de facto project managers for smaller awarding bodies. Potential for abuse is obvious. Suggest

> "*Any architect or design professional that holds contracts for services on public works projects should be ineligible to act as a third party labor compliance provider, share personnel or resources with a labor compliance provider or to hold an ownership interest in such a firm."*

(3) Discussion of subject of Contractors and subcontractors is unnecessary but methodology of 16426(a)(3)(A) deserves comment. Whether contractor does business in any area or with any enumerated client in (a)(2) is irrelevant and ultimately a matter of subject intent. If contractor chooses to say in application that it won't do business with ABC agency, there is no reason to question. A week later contractor could enter into contract with ABC and be compliant. The 5-year "look back" should also be reconsidered; as only criterion it falls short. Would be more effective if it read

> "*any contractor or subcontractor that within the preceding five years has been awarded a public works contract or is in the business of entering into public works contracts"* etc.

The question should be the business the applicant currently is in. Suggest

> "*If an entity is in a business in which it enters into contracts with public agencies in connection with public works, they have a clear conflict of interest and should not be eligible to provide third-party labor compliance services."*

(4) Potential abuse by construction managers, project managers, and program managers for reasons unrelated to labor compliance is obvious. Suggest

> *"An entity that enters into contracts with public agencies for project or program-specific construction management, project management or program management services should be ineligible to act as a third party labor compliance provider, share personnel or resources with a labor compliance provider or to hold ownership or interest in such a firm."*

We do not include facilities consultants as they normally would not be charged with administration of specific project issues or contracts.

(5) Understand and agree with general concept re labor activists or representatives but question whether "person or entity" language can withstand challenge. Given general context of proposal, precluding an individual based on connections may be questionable under California law. Know of "false flag" LCPs that started in individual names but at behest of organizations – view as destructive but right of individuals to employment may be overriding. Understand that subject of regulation is disclosures, not automatic disqualification, but there has to be reason for disclosures and that reason should be stated somewhere or DIR will get embroiled in a lot of complex issues with significant economic interests at stake, especially if an entity with a conflict is allowed to enter the LCP business and later is found to have a conflict at the time of recertification.

SB/SCBCTC -- oral: Huge conflict of interest if construction manager or general contractor also providing services of labor compliance on project.

Golden State – additional oral: Construction managers not involved in labor compliance; in own experience intentionally quite passive, playing role of good steward. As labor compliance officer could create records request that contractor could never satisfy to gain leverage on other issues.

In multiprime construction management, construction manager effectively plays the role of the prime (except financial). Construction manager's future business depends on overall performance, which presents a whole lot of considerations other than labor compliance.

Henderson – oral: Conflict of interest is the district's problem. Don't know that DIR wants to get into analysis of the conflict of interest.

Harris [LeSher] – oral: Owner can do same thing as construction manager. Number of contract management firms only represent owners' view that you not have construction interests or not a contractor on the side. They're not doing same operation and that's where you have conflict, not where a CM or project manager represents only the district (because the district makes those decisions). I gather a lot of information for DIR depending on wishes of client, but there's not a lot of conflict of interest.

*Director's Response: The Director appreciates the thoughtful comments, but notes that some of the commenters perceive or are attempting to construct "bright line" tests where no such test is intended or workable. Golden State's suggested amendments were not accepted because they move away from the approach of these regulations. The Director's proposal has attempted to identify potential sources of conflict and serves to highlight this issue for private parties who are unfamiliar with this aspect of government regulation. However, it is not the Director's intent to define what is or is not a conflict for purposes of saying that one sort of relationship will disqualify someone from operating an LCP and another sort will not. The Director agrees with commenters who suggest that DIR does not want to get into specific conflict analysis and that this is something for districts to handle. For the reasons discussed above in response to comments on section 16426 in general, the Director also decided not to include project managers within the list of disclosable relationships.*

Comments re Section 16426(a)(3) following July 2004 revisions:

Golden State: Suggests that "contractor or subcontractor" should be further modified to refer to "*construction* contractor or subcontractor." Otherwise may pick up conflicts where none exist.

*Director's Response: The recommendation was not accepted because the subsequent reference to "public works contract" serves the same limiting purpose while not being susceptible to a semantics debate over whether the modifier "construction" is intended to exclude contracts involving "alteration, demolition, installation, or repair" which are other enumerated types of "public works" under Labor Code section 1720.*

Comments re Section 16426(a)(5) during initial comment period:

Golden State: Delete everything after "Program" in first line. Disqualification of any counsel that may have represented a contractor, subcontractor, or surety will essentially eliminate any counsel competent in area of construction labor law, in view of fact that all firms serving awarding agencies will have conflict with serving a LCP. Will prove problematic in actual practice. Attorneys with substantial public works experience will fall only within two groups – those that represent public agencies and those that represent contractors. Prior to advent of third party LCPs there was no other market. Firms that represent public agencies won't want to represent third party LCPs given contractual relationship with district that is "bread and butter." Other group of representatives of contractors, subs, and sureties appears off limits from language. Who does that leave?

Scalabrini: Term "competent" is ambiguous and should be deleted. Suggest following:

> "The availability of ~~competent~~ legal ~~support~~ counsel for the Labor Compliance Program, with relevant legal experience (i.e. public works, labor and/or construction law)."

*Director's Response: The suggestions to change the language were not accepted. Regarding Golden State's comments, the Director notes that "also represent" is in the present tense – counsel cannot continue as counsel for both sides of dispute and also may effectively be disqualified based on past representation of an interested party. This is an important evaluative criterion but not inevitably disqualifying as the commenter assumes.*

*Regarding deletion of the modifier "competent," see previous response to same suggested amendment of section 16425(a)(5) above.*

Comments re Section 16426(a)(5) following July 2004 revisions:

Golden State: Reiterates prior comments about eliminating term "competent" and questions qualifier related to conflicts of interests, noting that qualified legal counsel would have to have represented clients in these other categories.

*Director's Response: See responses on these points immediately above. These comments are outside the scope of the further revisions. The conflict concern also misses present tense language – whether or not there were relationships in the past, LCP cannot use counsel that presently represents parties to be regulated.*

Comments re Section 16426(a)(6) during initial comment period:

CCMI: DIR already requires a Labor Compliance Program from third party administrators of approximately 100 pages[sic]. Requiring third party administrator to provide additional manual for DIR review is duplicative and overly burdensome. Some districts have approved LCP and contract with third party for assistance in implementing own program. To that extent third party should follow public agency's LCP and no additional manual is required. In instances where third party contracts with district that does not have approved LCP, then third party administrator is responsible for all aspects. What is purpose of proving manual to con-

tracting district? CCMI has written own manual for use of staff – requiring LCP to submit it for additional review and approval to DIR is overly burdensome. Recommend that DIR streamline LCP process to make as efficient as possible while still complying with the law.

*Director's Response: The proposal, which retains the existing language of the current section [being renumbered as section 16425(a)(6)], requires the* availability *of a manual, not the production of multiple manuals. Accordingly no change in this language was warranted.*

Comments re Section 16426(a)(7) during initial comment period:

Scalabrini: Suggest that term "method" be replaced with term "procedures."

*Director's Response: No change in the existing terminology found in the current section [being renumbered as section 16425(a)(7)] was proposed. For the reasons previously noted, there appeared to be no compelling reason to make this change, which might carry the implication of an intended change in meaning.*

Comments re Section 16426(a)(7) following July 2004 revisions:

Golden State and CASH: Make language consistent with revision to 16425(a)(7) as appears to have been the intent.

*Director's Response: The comment refers to a clarifying revision concerning violation information that is transmitted to the Labor Commissioner. The commenters were correct about the intent, and the oversight was corrected through a corresponding revision of this subpart in the final regulation.*

Comments re Section 16426(a)(8), (c), and (d) during initial comment period:

Scalabrini: Suggest that phase "third party Labor Compliance Program" be changed to "Third Party Administrator of a Labor Compliance Program."

*Director's Response: For the reasons noted previously in response to the comments on section 16426 in general, no change in this terminology was made.*

Comments re Section 16426(a)(8) following July 2004 revisions:

Golden State: Don't delete "rights" [in case someone else suggests doing so]. A third party has rights.

*Director's Response: No deletion was made. As noted previously, the purpose of this provision is for LCP to understand governmental role and function and not extend any substantive rights. Extent of authority relative to awarding body is a contractual matter.*

Comments re Section 16426(c) during initial comment period:

CCMI: Confusing interplay between one year anniversary date for approval, end of fiscal year requirement for annual report, and requirement to send annual report with request for final approval or extension. Whose fiscal year applies? – third party administrator's? school district with whom contracts? anniversary of approval? What if DIR does not respond (to extension request) within 30 days? Entire section needs to be clarified.

DIR determined that annual reports required not only for school districts two months after end of June 30 fiscal year but also that third party administrators required to submit in same time frame. No response despite fact that submitted by August 31, 2003.

*Director's Response: These comments and others as well as the new experience of dealing with hundreds of programs and reports persuaded the Director to change the time for filing Annual Reports as noted in the revisions summary above and comments on section 16431 below. The language of this subpart also was further revised to allow for more automatic extensions that are not necessarily tied to formal requests within prescribed deadlines.*

Comments re Section 16426(c) following July 2004 revisions:

Golden State: Same as 16425(c) above [deleting concept of initial and final approvals].

*Director's Response: This suggestion is beyond the scope of these proposed amendments but will be considered for future action.*

Comments re Section 16426(d) following July 2004 revisions:

Golden State: Same as 16425(d) above [re awarding bodies maintaining back up LCPs].

*Director's Response: No change in language, which involves maintaining a list of initially approved programs, is warranted.*

Comments re Section 16426(e) during initial comment period:

CCMI: With respect to subpart (e)(1) recommend that not increase paperwork of awarding bodies or JPAs. Is DIR requiring paperwork from public entity that does not have approved LCP but is contracting with third party administrator? Or does DIR require public entities with own LCP to notify DIR when they contract with third party for assistance?

With respect to subpart (e)(3) objects to ability to disallow or withdraw approval of operation of LCP for particular AB when third party remains approved to operate LCP. This is direct interference with contract. The only exception we can see is when agency has independently approved LCP which is being revoked and third party is only contracting to perform a portion of requirements. If this section allows DIR to decide which third party administrators should be allowed to contract with which agencies (*see* prior comments re geographic area) then CCMI objects as interfering with freedom of public bid and contracting process. If this section is specifically to deal with conflict of interest then needs to be more clearly stated. DIR should not determine ability of third party administrator to contract or provide services to public agencies. This is a public bid process and annual reporting requirements must be met.

DIR should not preempt contracting opportunities of qualified third party administrators unless specific conflict of interest requirements are violated.

San Diego COE: Please provide definition/clarification of "good cause" for denial or withdrawal of approval of third party provider LCP.

*Director's Response: In response to the commenter's questions about subpart (e)(1), the Director notes that each awarding body that is required by statute to initiate and enforce an LCP must have approval for that LCP under section 16425. A third party entity which seeks to operate LCPs by contract with awarding bodies must also be approved under this section (16426). An awarding body that contracts with a third party would need to have an approved LCP, and the third party would also need to be approved (although not necessarily as part of the same application process). While on its face this may appear duplicative, the application and reporting requirements imposed on an awarding body that contracts out would be limited, since in most circumstances it could just refer to relevant aspects of the approved third party program to show that the awarding body's program would satisfy the evaluative criteria. The reason the need for approval is imposed on both entities is because the life and responsibilities of one program are not coextensive with the other.*

*With regard to the comments about subpart (e)(3), the intent of this provision is to avoid a situation in which the Director approves an LCP of a particular scope and then that scope changes dramatically without notice to the Director – like granting a driver a Class C license and then having the driver use it to drive vehicles requiring a Class A license.*

*With regard to San Diego COE's comment, no specific criteria have been developed. There have been few denials of approval, and, it is not feasible to attempt to devise disqualification standards of general application without a greater body of experience.*

Comments re Section 16426(e) following July 2004 revisions:

CASH: Suggests deleting language of subpart (e)(3) without comment.

CCMI: Concerned about what constitutes "good cause" to disallow or withdraw approval.

*Director's Response: "Good cause" is not standardless but will have to be developed on a case-by-case basis for the reasons noted above. The purpose of subpart (e)(3) is so that the Director will not be required to withhold or withdraw approval from a third party LCP on an all or nothing basis. An LCP that is unable to service a large awarding body in a remote location may nevertheless remain capable of serving smaller awarding bodies in its own area.*

Comments re Section 16426 Drafter's Comment:

Golden State: Any concept of the applicant's resources beyond competent counsel and an approvable plan and body of procedures should be eliminated as a consideration. If resources are to be considered in initial or subsequent plan and program approval, there must be some objective connection between these resources and the demonstrable scope of operation at time of application. By definition the demonstrable scope of operation of any new applicant is

zero, and retrospective evaluation by DIR after the fact would lend itself to appearing arbitrary and subjective. Similarly, appropriate "client type" beyond DIR's current vetting procedure for initial approval would seem to be arbitrary and subjective. Prior comments about original intent and scope and resources apply here. The only way that the concerns about new relationship might be addressed is to inject a submittal/approval process into notification requirements outlines in 16423(b). This process would have to include specific responses to specific objective queries covering issues that would preclude new relationship if do not elicit proper response.

*Director's Response: See prior responses on the issues of resources and capacity. In practice such factors are evaluated routinely in connection with government contracts and grants. The Director agrees with the statement that there must be some objective connection between resources and the demonstrable scope of operation at the time of application, but not with the next statement that a company with, for example, experienced personnel and prospective contracts, has no demonstrable scope of operation. As each awarding body with which the third party LCP contracts seeks approval of its program, the capacity of the third party LCP to serve additional awarding bodies may change and require reevaluation. If the third party LCP expands its scope of operations without adding staff or making other adjustments to increase its service capacity, clearly a point may be reached when the Director cannot approve another awarding body's LCP based upon a contract with that overextended third party LCP. The evaluative criteria are designed to address these potential factors, and the requirement for each awarding body to have an approved program addresses the concern that a third party program may outgrow its capacity for effectiveness without detection.*

Comments re Section 16427 during initial comment period:

Best, Best & Krieger: No guidelines are provided for obtaining final approval. It's imperative that districts know what standards and documentation are required to show districts are satisfactorily monitoring compliance since failure will result in denial of approval and consequent loss of funds for completion of certain facilities.

San Diego COE: Final approval provision neither specifies standards required to obtain final approval nor the documentation necessary to show such standards have been met. Because failure to obtain final approval may result in loss of state funds, it is imperative that district specifically know what will be required. Because DIR will base final approval upon operation over a period of 11 months, districts are eager to obtain such guidance as soon as possible to ensure requirements are fulfilled and proper documentation is retained.

*Director's Response: This is existing language, and no substantive regulatory change was proposed. There is a body of experience with the LCPs that have operated under the existing language over the past twelve years. The language has been modified further to require a track record of active enforcement, as opposed to existing as just a shell program, before seeking final approval.*

Comments re Section 16427 and 16427(a) following July 2004 revisions:

Best, Best & Krieger: Request clarification of term "active enforcement responsibilities."

Golden State: Questions terminology "active enforcement responsibilities (as opposed to what)." Also suggests language changing "final approval" to "expanded powers."

CASH: Suggests change from "Final Approval" to concept of "expanded powers" and suggests that DIR define and put out for further comment.

*Director's Response: The term "active enforcement responsibilities" is intended to refer to a program that is actually engaged in the process of monitoring and enforcement rather than existing only on paper. As Golden State pointed out in other comments, there are awarding bodies that have sought and obtained approval for back-up programs that are not currently being used. The Director believes that any program should have a track record before being extended final approval. The suggestion for changing "final approval" to "extended powers," while somewhat descriptive of a distinction between initial and final approval, is beyond the scope of the proposed amendments and revisions. However, this suggestion warrants study for future consideration.*

Comments re Section 16427(d) during initial comment period:

CEA: Strike subsection and renumber other subsections accordingly. Believes that all LCP procedures should be consistent with Labor Commissioner per 16434(a).

CEA – oral: With 300 plus LCPs out there, alternative enforcement procedures would be a concern. It is hard enough to educate employers and employees with one policy let alone a multiple number.

*Director's Response: The Director did not propose to change the substance of this subpart and is not aware of actual problems with the language at this time. This language was designed to provide flexibility for the large all purpose LCPs that were approved under the pre-existing system. The Labor Commissioner, who must agree to any alternative and then continue to approve forfeitures under that alternative, would tend to share the commenter's desire for uniformity absent a compelling reason for any proposed alternative.*

Comments re Section 16428 during initial comment period:

Best, Best & Krieger: Proposals allow for revocation for failure to comply with reporting requirements pertaining to conflicts of interest, but conflict of interest requirements are not specified. A clarification of the requirements is needed.

San Diego COE: Districts request specific information regarding revocation of approval including (1) conflict of interest laws required to be fulfilled, (2) third parties that may bring a request for revocation, and (3) process for appeal of a revocation.

Golden State – oral: One way to address bad actor agency might be to mandate use of approved third party LCP.

*Director's Response: The applicable laws and reporting requirements are set forth in the Government Code and regulations promulgated by the Fair Political Practices Commission. They are generally applicable to agencies and officials of local government, who should be familiar with the relevant requirements. It would not be prudent for the Director to try to reiterate in these regulations what restrictions and duties the Government Code and FPPC regulations otherwise impose on local agencies and officials. What the Director decided to highlight in these regulations is the fact that these requirements, by their terms, also apply to third party LCPs serving as contract consultants exercising governmental authority on behalf of local agencies.*

*The existing regulatory language has provided that "interested parties" may request revocation, although whether to act on that request is solely within the Director's discretion. The existing regulatory language also prescribes the procedure involving notice, a hearing if appropriate, and a finding of "cause" for revocation, with several causes enumerated. The Director has not proposed to change any of these standards or procedures other than to expand the list of causes for revocation.*

*The Director has clarified in section 16421(b) when a local agency must contract with an approved third party LCP, although it is not based on the performance concern raised in Golden State's comment. That suggestion may have merit but would have to be addressed in the context of an awarding body in jeopardy of losing approval for its in house program.*

Comments re Section 16428(a) during initial comment period:

Scalabrini: Suggest that phrase "if appropriate" be removed. Revocation should only occur if the awarding body or Administrator has been provided a hearing and there has been a finding of cause for revocation.

Suggest that (a)(1) be modified as follows:

*"Repeated or willful failure of the Labor Compliance Program to monitor compliance with any material requirement of the labor code or these regulations. . ."*

Suggest that (a)(2) be modified as follows:

*"Repeated or willful failure of the Labor Compliance Program to file timely, complete, and accurate reports to the Director as required by Section 16431 or elsewhere in these regulations."*

*Director's Response: These suggestions all concern existing language that the Director did not propose to change. The concern with removing the words "if appropriate" is that it would make the holding of a hearing a mandatory prerequisite for revocation, including in circumstances when a hearing would serve no purpose, such as for an abandoned program or following a felony conviction for criminal conduct in the operation of the program.*

*Regarding the other suggested language, there is no evidence of approvals being withdrawn arbitrarily under the current system, but these proposals may warrant further study. The reason that the "pattern' of failure" language appears in the new subpart (a)(3) is that losing an*

*appeal is not by itself indicative of any malfeasance or misfeasance in program operation, while a string of bad cases is more likely to be indicative of a program that cannot discharge its responsibilities properly. In other circumstances, it may not be necessary or appropriate to look for a pattern, such as with felony misconduct, a complete abandonment of responsibilities, or insolvency (which arguably might not be willful).*

Comments re Section 16428(a), (a)(1), and (b) following July 2004 revisions:

Golden State and CASH: Suggest language giving LCP a pre-revocation opportunity to cure and modifying "failure" with the words "a consistent pattern of."

*Director's Response: The Director did not propose to change existing language. See response to comments during initial period immediately above.*

Comments re Section 16428(b)(3) following July 2004 revisions:

Golden State: Suggests that language of last sentence unduly restricts Director's options, which ought to include censures or restrictions short of revocation.

CASH: Suggest modifying language of last sentence to make procedure sole remedy for an interested party. No further comment.

*Director's Response: No substantive change was proposed in the existing language. The suggested change is unnecessary as it is not the intent of the existing language to acknowledge or create any separate or additional rights or remedies relative to a revocation. This subpart does not establish any restriction or limit on the Director's discretion.*

Comments re Section 16428(c) following July 2004 revisions:

CCMI: A hearing should be provided if requested to protect the due process rights of the third party LCP.

*Director's Response: No action is necessary. The subpart refers to the denial of a request for revocation. Since the LCP is not aggrieved by such a decision, it has no due process interest in a hearing on the denied revocation request.*

Comments re Section 16429 following July 2004 revisions:

CCMI: Information detail in subpart (b) is unduly burdensome when it must be included in the Call for Bids.

*Director's Response: This is existing regulatory language, for which no substantive change was proposed. There is no evidence that the requirement has been burdensome in practice.*

Comments re Section 16431 during initial comment period:

CASH – oral: There should be discussion on what really is important in reports because of enormity of numbers that will be coming in. Date for submission also should be changed so don't all come in at once or right away after starting up program.

*Director's Response: The Director considered a new alternative reporting option for small projects, but has withdrawn that proposal for further study in connection with a general study and further rulemaking proceeding on review, audit and enforcement responsibilities.*

*The language of subpart (a) was revised and a new subpart (c) was added to change the reporting period from the fiscal year, which would tend to be the same for most local agencies, to a date coinciding with the anniversary of initial approval to operate an LCP. The revisions also allow flexibility to change the reporting period.*

Comments re Section 16431 following July 2004 revisions:

NCECI: Annual report should include names of contractors assessed and penalties or other actions taken and should be clearly identified as public information.

*Director's Response: The requested changes are outside the scope of the revisions. A specification that the reports are public information appears unnecessary as nothing presently makes them private.*

Comments re Section 16431(a) during initial comment period:

Scalabrini: Replace term "Labor Compliance Program" with term "Awarding Body or Third Party Administrator of a Labor Compliance Program ... "

*Director's Response: This suggestion corresponds with the commenter's other recommendations to change the terminology designating third party LCPs. For reasons discussed above, particularly under section 16426 above, the Director has declined the suggestion as unnecessary and carrying the risk of incorporating unintended "term of art" meanings.*

Comments re Section 16431(a) following July 2004 revisions:

Golden State: Suggests deleting the words "awarded or" and adding "under the Labor Compliance Program,".

CASH: Suggests "for which the Labor Compliance Program was implemented" in lieu of "or monitored or enforced." No further comment.

*Director's Response: In response to these suggestions, the Director further modified the subpart in the final regulation by deleting the words "awarded or." The remaining language expresses the relevant requirement, which is to report on the "number of contracts monitored or enforced" for labor compliance purposes.*

Comments re Section 16431(c) [new version] following July 2004 revisions:

CASH: Requests a definition for the term "projects."

*Director's Response: This comment pertains to a new subpart (c) that was proposed as part of the revisions issued on July 15, 2004, but was not incorporated into the final text. The withdrawn proposal provided an alternative reporting method based upon other proposed amendments to section 16434 that were also withdrawn pending a further rulemaking.*

Comments re Section 16432 during initial comment period:

Best, Best & Krieger: Unclear what event triggers DLSE request for an audit and effect of such request on duties of LCP.

San Diego COE: Please clarify circumstances under which the Labor Commissioner may request an audit and how such requests may affect the responsibilities of the districts.

*Director's Response: These comments pertain to existing regulatory language that the Director did not propose to change. Generally speaking, a request by the Labor Commissioner (DLSE) to perform an audit would be triggered by a credible report or other information indicating that a contractor or subcontractor was not complying with prevailing wage requirements. Per the language of this regulation, an LCP would be required to perform an audit as requested that is sufficient to address whatever concern caused the Labor Commissioner to make the request.*

Comments re Section 16432 following July 2004 revisions:

NCECI: (1) LCP should be required to notify workers at least once during course of job of ability to file wage complaint with LCP; (2) audit should also be required upon receipt of (i) complaint or information from worker alleging underpayment or (ii) complaint supported by credible evidence filed by private labor compliance organization; and (3) clarify that payroll records includes prime, subcontractors, and third tier subs.

*Director's Response: These comments are beyond the scope of the revisions but also involve issues to be addressed in training. Notification to workers of the existence of an LCP contact person generally is an understood monitoring and enforcement responsibility. The Director does not believe a duty to audit should be triggered by any allegation of underpayment nor that a further specification of circumstances under which audits are "required" is necessary at this time. The review of payroll records would extend to contractors and subcontractors, including lower tier subs, who were potentially covered by prevailing wage requirements. An audit should focus on the contractor or subcontractor suspected to have violated prevailing wage requirements. These are matters to be addressed in training.*

Comments re Section 16432(a) following July 2004 revisions:

LCPSI: Add specified detail to subpart to further define payroll records to be reviewed, specify purposes of review, and suggest methods. Commenter notes that computerized payroll analysis currently in use by some LCPs fails to compare gross wages for all projects with

wages for "this project" thus enabling contractors to mask violations through underpayments for other non-prevailing wage work. Commenter also notes that there is a general lack of understanding among LCPs as to what to look for in reports for purposes of detecting violations, and thus that monitoring standards need to rise.

*Director's Response: These requests go beyond the scope of the revisions, and the commenter's concerns are more properly a subject for training. It is not feasible to draft detailed regulations to cover all scenarios, and regulatory specifications are often misconstrued as mandates even when only offered as examples or suggestions. The Director has determined to revisit minimum review, audit, and enforcement requirements in a separate rulemaking.*

Comments re Section 16432(b) [formerly (a)(1)] during initial comment period:

Scalabrini: Suggest replacing phrase "best available information" with "information readily available to the Awarding body or the Administrator."

*Director's Response: This concerns existing language that the Director did not propose to change. This suggested change would essentially change and weaken monitoring duty, as the best available information (*e.g. *time cards) arguably may not be readily available.*

Comments re Section 16432(b) following July 2004 revisions:

Golden State: Commenter aware of efforts to restrict LCP authority to request only certified payroll records and that a subpoena should be required for corroborative data.

CASH: Suggests language indicating that an audit may be conducted when a violation is suspected and that an awarding body may request additional payroll records pursuant to Labor Code §1776.

LAUSD: Suggest adding (1) "but not limited to" before enumeration of supporting documents; (2) 1776 (g) penalties for not providing back up documentation; and (3) that back up documentation to be provided at no cost to awarding body.

*Director's Response: Golden State may have misinterpreted the intent of the other party. Information that an awarding body or LCP may obtain from a contractor is a matter of both statute and contract. DIR cannot expand statutory authority, but an awarding body can impose additional standards or requirements by contract. A subpoena is an additional tool to compel the production of documents that is backed by the judicial system's authority to impose sanctions for contempt. The use of subpoenas is prescribed by statute, and an LCP's ability to use this particular tool would depend upon what authority may be derived by statute and compliance with the terms of that statute.*

*CASH's first suggestion is unduly limiting. An LCP should not be precluded from performing a random audit nor should there be a de facto probable cause standard. Labor Code §1776 provides a specific procedure for a particular record – the certified payroll record. The*

*awarding body also can use the public works contract as a vehicle for ensuring the availability of back-up data upon reasonable request or demand.*

*Regarding LAUSD's comments, the language added to subpart (b) was intended as a suggested directive to LCP and purpose is not to impose new or different substantive requirement on contractors. However, this revision has been withdrawn pending a further study and separate rulemaking on review, audit, and enforcement responsibilities. 1776(g) penalties are for a specific statutory violation and cannot be expanded by regulation to other circumstances. However awarding bodies can, as a matter of contract, specify what must be provided and when and the consequence for not doing so. No regulatory action is required in response to any of the above comments at this time.*

Comments re Section 16432, Appendix B following July 2004 revisions:

CCMI: (1) It would be a nightmare to get confirmation of workers' compensation coverage for every contractor and subcontractor; (2) it is unduly burdensome to obtain apprenticeship sponsor information; and (3) defined audits should not be required for all contractors and subcontractors.

*Director's Response: These comments concern existing regulatory language, for which no substantive change was proposed. There is no evidence that these requirements have been burdensome in practice, nor has the Appendix B form been interpreted as requiring a full blown audit of every contractor and subcontractor on every contract.*

Comments re Section 16433 during initial comment period:

CCMI: Term "installation" can apply to either maintenance, rehab or repair or to new construction. Term should either be included under both exemptions or left alone. CCMI prefers leaving alone.

*Director's Response: "Installation" appears as a distinct term under Labor Code §1720(a)(1), and the commenter identified an oversight in subpart (a)(1)'s failure to address which exemption level applies to installation work. The subpart was revised to classify installation work as within the $25,000 exemption from prevailing wage requirements for awarding bodies with all purpose LCPs.*

Comments re Section 16433 following July 2004 revisions:

Golden State: Suggests raising the exemption thresholds.

*Director's Response: These thresholds are set by statute and cannot be modified by the Director of Industrial Relations.*

Comments re Section 16434 during initial comment period:

Scalabrini: Title should be reworded to read "Duties of Awarding Body or Administrator."

*Director's Response: Action unnecessary. This is another question of terminology. The amendments were drafted to arrive at an end-product LCP, with multiple ways to get there.*

Comments re Section 16434(a) during initial comment period:

Scalabrini: Regulation should refer to the AB or Administrator as opposed to the LCP. Accordingly should begin with *"An Awarding Body or Administrator of the Labor Compliance Program shall have a duty to the Director . . ."*

Best, Best & Krieger: No guidelines are provided to explain "in a manner consistent with the practice of the Labor Commissioner." The standard is vague, ambiguous, and overly broad which makes it extremely difficult to understand, let alone conform to.

San Diego COE: Language "in a manner consistent with the practice of the Labor Commissioner" provides little or no guidance as to how districts may fulfill this standard. Guidance as to what this entails is necessary to ensure satisfactory understanding of what needs to be accomplished.

*Director's Response: The Director decided against the suggested change in terminology for reasons noted in responses to several other comments above. Although "manner consistent with the practice of the Labor Commissioner" was existing text which the Director did not propose to change, additional guidelines were proposed in response to the above comments as well as related comments by the Department of Finance and others. However, the Director is not sure that the proposals adequately or accurately addressed what is required by statute. Consequently the Director has withdrawn all of the proposed new subparts pending a further study and separate rulemaking on these issues.*

Comments re Section 16434(b) during initial comment period:

CCMI: Requirements of a LCP in regards to apprenticeship are cumbersome and burdensome. Proposed regulations in this section are appropriate and practical to enforce and a substantial improvement over the original scope of monitoring that LCPs were informed they were to accomplish. To fully comply under original instructions given by DIR and DAS during training takes disproportionate amount of time and is fraught with impossible situations for contractors and LCPs. Simple enough to require filing of DAS-140 forms on all projects and verify enrollment in bona fide programs and payment of proper wages and training contributions. Real problem is in monitoring, auditing and enforcement of 1:5 hour apprenticeship ratio.

While general contracts under $30,000 or work completed within 20 days are exempt from some apprenticeship requirements, this does not apply to lower tier subcontractors. Reality is that subs who work on projects less than 20 days do not necessarily have level of work to secure an apprentice. Likewise, when sub employs only one journeyman in specific craft, use of an apprentice is not practical. Hourly ratio is an enforcement nightmare. Additionally, contractors affiliated with approved programs had different levels of apprentice to journeymen ratios. Thus, LCP does not have single standard to monitor but multiple. Hour-based

standard is administrative nightmare that takes up disproportionate amount of enforcement time and public agency doesn't get forfeiture penalties. CCMI has discussed with DAS and was told that due to staffing constraints DAS only wants to hear about most egregious violations. Yet DIR says full compliance required, and CCMI doesn't want to place its approval as third party administrator in jeopardy. CCMI supports clarification in these regulations to eliminate burden of monitoring apprenticeship ratios on LCP projects

Scalabrini: First sentence should be modified to read *"Either the Awarding Body or the Third Party Administrator of a Labor Compliance Program . . ."*

Best, Best & Krieger: Proposals require LCPs to enforce payment of prevailing apprentice rates. Districts have had great difficulty locating rates and requests are not [answered] in a timely manner, making it extremely difficult to ensure compliance. DIR should modify its practices with respect to rates to ensure easy accessibility to current information or should eliminate requirement.

San Diego COE: Primary concern as to apprenticeship standards lies in the difficulty in obtaining wage rates. Experience thus far is that rates are not readily available, not current, and requests not provided on a timely basis. Request that DIR address and accommodate these concerns.

Comments re Section 16434(b) following July 2004 revisions:

Best, Best & Krieger: Reiterates prior comment that DIR needs to modify practices with respect to making apprenticeship rate information readily available or eliminate requirement. DIR should also require apprenticeship programs to verify contributions within ten (10) days of receipt of request.

CASH: It is difficult for an LCP to ascertain accurate apprentice wage rates – they are not on the DAS site and often difficult to obtain from the apprenticeship committee. DIR should consider these obstacles prior to enforcing requirements – a school district cannot enforce without appropriate and timely information.

CCMI: Word "no" in subpart (b)(2)(B) should be "not."

LAUSD: Appreciates clarification of obligations re apprentices, but concerned about term "including" which suggests other unspecified obligations and about difficulty getting information out of DAS. Would also want untimely contributions to constitute a violation.

*Director's Response: This subpart has been withdrawn pending a further study and a separate rulemaking that focuses on the review, audit, and enforcement responsibilities of labor compliance programs.*

Comments re Section 16434(c) [new] following July 2004 revisions:

CCMI: Questions five year retention requirement in light of two/three year statute of limitations. Requests clarification on who should retain records.

LAUSD: Request clarification that all purpose LCPs not required to prepare summaries and that records may be retained physically or electronically. Alternatively suggest that LCPs with Final Approval or Awarding Bodies with over 300 projects annually are excluded from reporting.

Comments re Section 16434(d) [new] following July 2004 revisions:

CCMI: Request clarification of who must attend training.

Comments re Section 16434, Appendix C [new] following July 2004 revisions:

NCECI: Report form should include names of contractors assessed and penalties or other actions taken and should be clearly identified as public information.

Golden State: Suggests (1) that the term "Acceptance" is a soft concept that may be indeterminable while "Notice of Completion" is objective, and (2) use of form may lead to excessive recordation of information at considerable expense. Believes that report requires considerable more thought and input from practitioners.

CASH: Prefers second alternative with some additional slight modifications – deleting "Acceptance Date" line and revising item 4.b. to state "Attach actual CPRs relevant to this project for identification of all classifications used." Urges optional use if not adopted.

CCMI: Unclear about use of reports; prefer first option. Listing all contractors and subcontractors (item 3a) would be an administrative nightmare and why would DIR need information in item 3b? Item 4 not as easy as Yes/No, and form 2 requests copies of all CPRs, which DLSE does not want. Item 5 unnecessary. Form will increase paperwork; okay in lieu of Annual Report but not if required for each project.

*Director's Response: Proposed subparts (c), (d), and (e), and proposed new Appendix C have been withdrawn for further study and a separate rulemaking focusing on review, audit, and enforcement responsibilities of labor compliance programs.*

Comments re Section 16435 and 16435(a) during initial comment period:

Scalabrini: Should address whether the awarding body may delay all or some of the progress payment until a delinquency in providing records is cured by the contractor or sub.

Suggest that subpart (a) be modified to read as follows:

> ""*Withhold" means to withhold from ~~cease~~ payments by the Awarding Body, or others who pay on its behalf, or agents, to the general contractor, in an amount equal to the underpayment, as defined in these regulations."*

CEA: Retain language proposed for deletion and add the following:

*"Where the violation is an underpayment of the prevailing wage rate, the general contractor shall be notified of the nature of the violation and reference made to its rights under Labor Code Section 1729.*

*"Where the violation is for delinquent or inadequate payroll records by a subcontractor, the amount withheld shall not exceed the amount retained by the general contractor pursuant to its subcontract with the subcontractor. Pursuant to California Labor Code Section 1776(g) the general contractor shall not be subject to any penalty assessment."*

Director's Response: *In response to these comments, the Director proposed a further revision restoring the deleted language from subpart (a) [first sentence under CEA comment above] and adding a limitation on withholding for subcontractor violations similar to the second sentence suggested by CEA above. After receiving further comments on these revisions, the Director decided not to incorporate the latter revision at this time because it fails to address adequately an awarding body's statutory duty under Labor Code §1771.5(b)(5) to withhold contract payments when payroll records are delinquent or inadequate. As the third sentence suggested by CEA (but not accepted for use by the Director) indicates, there is a tendency to confuse the duty to withhold payments under Labor Code §1771.5(b)(5) with the penalties assessed for failing to timely produce certified payroll records in response to a formal demand under Labor Code §1776. The original language of this subpart has been retained pending study and further recommendations on how to amend this subpart in a way that accounts for statutory requirements while setting some proportional relationship between amounts withheld and the violation being corrected.*

Comments re Section 16435(a) following July 2004 revisions:

LAUSD: Suggests that contractor be liable for subcontractor's Labor Code § 1776(g) penalties and questions limitations on withholding in light of fact that awarding body's contract is with prime and does not know what amounts are due to the sub. Also prime and sub may both dispute propriety of withholding.

Director's Response: *This commenter offers a countervailing view that was not adequately addressed in the limitation on withholding for delinquent wage records that was proposed in the July revisions. Accordingly, the Director decided not to amend subpart (a) at this time. However, the Director hopes to bring interested parties together to devise language that takes these concerns into account while setting some proportional limit for the withholding of contract payments based on delinquent or deficient records.*

Comments re Section 16436 during initial comment period:

CEA: Change last part of first sentences so that it reads "... Labor Code Section*s* 1771.6 *and 1742*."

Director's Response: *This change was made.*

Comments re Section 16436(b)(3) following July 2004 revisions:

CASH: Requests clarification of forfeiture/withholding authority relative to apprentices.

*Director's Response: The authority to assess and withhold is limited to the underpayment of prevailing wages and penalties assessed under Labor Code §1775(a) and 1813 for underpayment of prevailing wages. If a worker is not properly qualified as an apprentice, that worker is entitled to the usual journeyman prevailing rate. This subpart refers to recovering (or withholding) the difference between those rates for a worker who was paid the apprentice rate but not qualified for treatment as such. The DLSE and LCPs do not have authority to assess or withhold separate penalties for violation of apprenticeship standards. The Director did not propose to amend this subpart, and no change appears to be necessary at this time.*

Comments re Section 16437(a)(1) during initial comment period:

CCMI: Confusing requirement to provide dates of acceptance and completion because implies cannot submit request for forfeiture until project complete. LCP should be able to request forfeitures and withhold wages before project is complete; subcontractor may complete work in first few months of lengthy project. Where LCP finds willful violations, awarding body should be allowed to withhold estimated wages and penalties – previously instructed could not do so until forfeiture approved. If request for forfeitures to be made at conclusion then regulations should convey right to withhold wages and penalties during interim. If instead DIR finds a due process problem in doing so, then there has to be provision for approval of forfeitures during pendency of project.

Golden State: It should not be assumed the project is complete. With more timely enforcement by LCPs, case will be submitted while project in progress. Language should provide for "acceptance" and "notice of completion" to be projections where that is the case, which still provides DLSE with key information as to when statute of limitations could be triggered.

Scalabrini: Suggest that subpart be modified to read as follows:

*"The date that the public work ~~w~~has been accepted by the Awarding Body, and the date that a notice of completion was ~~filed~~ recorded (if any)."*

*Director's Response: In response to these comments, this subpart was modified so that the LCP now must indicate "whether" the project was accepted, and if so, the applicable date. As the first commenter indicates, this section should not be construed as requiring an LCP to wait until a project is completed before seeking approval of a forfeiture. CCMI's comment also underscores the confusion between an awarding body's statutory duty to withhold for wage violations and the need for DLSE approval for forfeitures based on underpayments and penalties, including penalties for failing to timely respond to a formal demand for certified payroll records under Labor Code §1776.*

*Because Labor Code §1741 refers to the "filing of a valid notice of completion" the term "filed" is being retained in this subpart. The date of recording potentially may be later than the date of filing, thus leading to uncertainty over the applicable date and limitation period if the suggested change were made.*

Comments re Section 16437 following July 2004 revisions:

CCMI: Unclear whether one is to file request for forfeiture before Notice of Completion. Suggest Notice to Withhold be allowed contemporaneously with Request for Forfeiture.

*Director's Response: The commenter appears confused by terminology. A request for forfeiture must be submitted and approved before issuing a Notice of Withholding of Contract Payments. Among other things, DLSE must formally approve penalties under Labor Code §1775(a). Notice of Completion refers to completion of public works project and is a trigger for statute of limitations, but otherwise does not affect the timing of a forfeiture.*

Comments re Section 16437(a)(4) following July 2004 revisions:

CASH: Suggests defining or deleting term "investigation" and refers backs to suggested modifications of section 16432.

*Director's Response: Although this was not language the Director proposed to amend, the commenter identified a technical and potentially confusing error in the original language. In response, the Director revised this subpart by removing the quotations around the words "audit" and "investigation" and changing the words "as defined in" to "under."*

Comments re Section 16437(a)(7) during initial comment period:

Best, Best & Krieger: Clarification in proposal which incorporates penalty mitigation language of Labor Code §1775(a) is very helpful.

*Director's Response: No response necessary.*

Comments re Section 16437(b) following July 2004 revisions:

CCMI: Dislikes standard of "as soon as practicable after the violation has been discovered," which would eliminate the opportunity for correction and settlement, and suggests instead that should not occur until 30 days after all work has been completed on the project but before release of the final payment, with the awarding body not to release final payment until 35 days after report filed.

LAUSD: Labor Code §1741 provides a clear statute of limitations and regulatory language may be conflict.

*Director's Response: The purpose of the amendments is to clarify rather than change existing standards. CCMI appears to have reversed its earlier position on the advisability of seeking approval of forfeitures and withholding payments before a project is complete. The Director believes CCMI's earlier position is correct. Waiting for the project to be completed deprives an LCP of its ability to use the most effective enforcement mechanism – the retention of contract payments funds – against the many subcontractors who complete their work before the entire project is completed. Experience shows that many if not most prevailing wage*

*violations are committed by subcontractors, so it is not appropriate to delay all enforcement to the end of the contract.*

*The deadline language was rewritten in an effort to make it more understandable and to encourage prompt submission of forfeitures. The limitations periods and their location in the Labor Code have changed a number of times since the advent of LCPs, and even the current statute refers expressly only to enforcement actions undertaken by the Labor Commissioner. In any event, the revised language should not be read as being in conflict with the statute nor as precluding the Labor Commissioner from considering a late forfeiture request, although such requests should be exceedingly rare. The Director also notes that commenter has not suggested an alternative that would address its concerns.*

Comments re Section 16439(a) during initial comment period:

CEA: Amend first sentence to read as follows:

"A contractor or subcontractor may *request a settlement meeting pursuant to Labor Code Section 1742.1(b) and may* appeal the result seek review of a Labor Compliance Program enforcement action in accordance with Labor Code sections 1771.6(b) and 1742 and the regulations found at Title 8 C.C.R. sections 17201-17270."

*Director's Response: The proposed language was accepted and incorporated into the regulation.*

Comments re Section 16439(a) following July 2004 revisions:

LAUSD: Burden of proof language is in conflict with Labor Code §1742(b).

*Director's Response: The burden of proof language is based on the language of 8 CCR §17250(a), which construes other statutory language as imposing certain standards on an Assessment or Notice of Withholding in order for an enforcement action to be maintained. The burden of proof cannot shift to the contractor without some minimum standard of reliability (basically compliance with statutory requisites) of the document that creates liability.*

Comments re Section 16439(b) during initial comment period:

Best, Best & Krieger and San Diego COE: No guidelines are provided to explain "in a manner consistent with the practice of the Labor Commissioner." The standard is vague, ambiguous, and overly broad which makes it extremely difficult to understand, let alone conform to.

*Director's Response: The phrase, which has appeared in Section 16434(a) since these regulations were first adopted in 1992, refers to the basic standard governing LCP enforcement responsibilities. In response to similar comments, the Director proposed to further clarify this phrase through revisions to Section 16434. However, the Director is not sure that the proposed language was appropriate and consequently has withdrawn the proposals pending a further study and separate rulemaking on the issues of review, audit, and enforcement responsibilities of labor compliance programs. Note also, however, that in the context of this*

*particular section, the phrase refers to the basis for a decision by the Labor Commissioner to exercise his or her discretion to intervene in the formal appeal and review of an LCP enforcement action under Labor Code §§1771.6 and 1742(b). As such, it imposes no standard for LCPs to conform to.*

Final Comments re proposals in general during initial comment period:

CCMI: All CCMI programs include prejob conferences, monthly auditing of certified payroll records, monthly job interviews, etc. For LCPs granted final approval in coming year, CCMI suggests granting flexibility to perform random samplings of prevailing wage project instead of auditing every hour or every week of the project. School districts are hard hit by budget constraints and imposition of LCPs has cut into severely limited resources. Random sample suggestions: projects under 3 months audited at completion; projects of 12 or more months audited not less than every 3 months. If suspicion of underpayment or non-compliance LCP would be required to monitor more frequently and thoroughly.

*Director's Response: This comment points to a misconception about the need for and frequency of audits. For reasons discussed above, the Director has determined to study further and conduct a separate rulemaking that focuses on the review, audit, and enforcement responsibilities of labor compliance programs.*

CASH: CASH believes statute for limited and mandated LCPs have been established that create different requirement for LCPs. CASH formally requests withdrawal of proposals to draft new regulations for limited and mandated program specifically imposed on districts seeking capital funds. These regulations would be different and distinct from the regulations established for voluntary LCPs.

*Director's Response: The scope and purpose of these amendments has been discussed in this Final Statement of Reasons. The commenter has changed its views on the regulations, as reflected in its comments following the July 2004 revisions, and has provided valuable input and assistance in helping the Director improve the final product.*

## ALTERNATIVES DETERMINATION

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to affected private persons than these regulations.